Southern Bakeries, LLC and Bakery, Confectionery, Tobacco *and* Grain Millers Union, Local 111. Cases 15–CA–101311, 15–CA–103186, 15–CA–104063, 15–CA–106033, 15–CA–107597, 15–CA–108613, 15–CA–109746, 15–CA–109753, 15–CA–109755, 15–CA–115945, 26–CA–077268, and 26–CA–077536

August 4, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On July 17, 2014, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to adopt the judge's rulings, findings,[1] and conclusions as modified below, to amend the remedy, and to adopt his recommended Order as modified and set forth in full below.[2]

The Respondent operates a commercial bakery in Hope, Arkansas. From 2005 until 2013, the Respondent recognized the Union as the representative of a unit of its production and sanitation employees. The parties' most recent collective-bargaining agreement expired on February 8, 2012. On July 3, 2013, while a decertification petition was pending, the Respondent withdrew recognition from the Union. The judge found, and we agree, that the withdrawal of recognition was unlawful, and that the Respondent committed numerous other violations of Section 8(a)(1), (3), and (5) of the Act before and after the withdrawal of recognition. Specifically, we affirm the judge's findings, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by creating an impression of surveillance and promising to reward employees with higher wages and other unspecified benefits if they rejected the Union; Section 8(a)(3) and (1) by disciplining employees Sandra Phillips and Lorraine Marks; and Section 8(a)(5) and (1) by changing plant access rights and procedures and space for employee union meetings, withdrawing recognition from the Union, and unilaterally granting unit employees a wage increase after withdrawing recognition.[3] In addition, for the reasons explained in section I below, we affirm the judge's findings that the Respondent violated Section 8(a)(1) by disparaging the Union, threatening plant closure, and stating that bargaining would be futile. Finally, as discussed in section II, we find merit to several of the General Counsel's exceptions and accordingly find that the Respondent promulgated an unlawful rule and con-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that the Respondent: (1) violated Sec. 8(a)(5) and (1) by unilaterally installing surveillance cameras; (2) violated Sec. 8(a)(1) when Supervisor Kenny White threatened employee Christopher Contreras with job loss; and (3) violated Sec. 8(a)(3) and (1) by investigating employees Lorraine Marks and Vicki Loudermilk and placing letters in their personnel files. Additionally, in the absence of exceptions, we adopt the judge's dismissal of the allegation that Contreras' discharge was unlawful.

The Respondent filed bare exceptions asserting that the judge erred in finding that it unlawfully threatened discharge, job loss, and unspecified reprisals. The Respondent presented no argument in support of these exceptions. Accordingly, we find, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, that these exceptions should be disregarded. See, e.g., *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007).

[2] We shall modify the judge's Conclusions of Law, remedy, and recommended Order to remedy the violations found and in accordance with the Board's standard remedial language. In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended Order to require the Respondent to compensate Marks for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 15 allocating the backpay award to the appropriate calendar year. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[3] In affirming the judge's finding that the Respondent created an unlawful impression of surveillance, we rely on *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), enfd. 181 Fed.Appx. 85 (2d Cir. 2006). In affirming the judge's findings that the Respondent unilaterally changed the Union's access rights before and after it withdrew recognition from the Union, we rely on *T.L.C. St. Petersburg*, 307 NLRB 605, 610 (1992), enfd. 985 F.2d 579 (11th Cir. 1993), and *Ernst Home Centers*, 308 NLRB 848, 848–849 (1992).

The judge cited two cases, decided by a two-member Board, that were later invalidated by the Supreme Court. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). However, both cases were subsequently reconsidered by a three-member panel of the Board and the resulting decisions, which adopted the rationale and result of the respective two-member decision, were judicially enforced. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009), incorporated by reference at 357 NLRB 633 (2011), enfd. *Mathew Enterprise v. NLRB*, 498 Fed.Appx. 45 (D.C. Cir. 2012); *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009), incorporated by reference at 355 NLRB 706 (2010), enfd. 452 Fed.Appx. 433 (5th Cir. 2011).

ducted unlawful interrogations.[4]

I.

A. Unlawful Disparagement of the Union

On January 17, 2013, the Respondent disseminated a document entitled: "Answers to Employee Questions Dated January 16, 2013."[5] The document asserted that it was presenting "the facts and truths about contract negotiations and union statements." It began by recounting the bankruptcy eight years earlier of the Respondent's predecessor, Meyer's Bakeries, whose employees had been represented by the Union. The document then addressed the parties' prior contracts, noted that the parties had been negotiating a new contract for close to a year, and stated that, in the event of impasse, the Respondent could implement its best and final offer. The memo then stated in relevant part:

> All that the union could do is reject the contract terms and call for a strike (as they recently did at Hostess Bakeries)[6] but the union cannot guarantee anything SBLLC [Southern Bakeries] does not agree to do. The union cannot guarantee 45 to 50 cent raises or any raises. The union appears to have plans to take our employees out on strike here in Hope, same as they did recently at Hostess, where over 18,000 jobs were lost and 33 bakeries and 500 retail outlets were closed. Perhaps that is why the International (Maryland) BCTGM representatives have come to Hope.
>
> . . . .
>
> The union often makes promises they have no ability to keep. . . . The union leaders have nothing to lose because while employees are on strike the leaders still have their pay, benefits and employment even if our employees have none. For your protection, ask the union to put their guarantees and promises in writing.
>
> . . . .
>
> The union statement that [the Respondent] is "gonna fire [H]ispanics (Latino employees) if they change their names" simply makes us sad and is entirely false. We believe the union feels they can frighten our employees into allowing the union to continue to control their working lives at SBLLC.
>
> In fact, SBLLC values the diversity of our workforce. We are truly an Equal Opportunity Employer. We welcome all applicants, including Latino applicants and employees as evidenced by the large number of Latino employees that are currently a part of our team.
>
> You should ask the union if they have ever complained about SBLLC supposedly favoring Hispanic applicants and employees. They have complained. We determined that their complaints were factually unfounded – we treat all applicants and employees equally. The company provided the Local union with a copy of our Equal Employment Opportunity policy to review with the International and raised concerns that the Local was discriminating against Hispanics through targeted grievance allegations.

In addition, the document repeatedly labeled the Union's alleged campaign statements as "incredible," "false," "misleading," and "frighten[ing]." We therefore agree with the judge that the document unlawfully disparaged the Union.

Section 8(c) protects "the expressi[on] of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form . . . if such expression contains no threat of reprisal or force or promise of benefit." Indeed, "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006). Nevertheless, such statements must be considered in context, not in isolation, and disparaging statements uttered in the context of other unfair labor practices may rise to the level of unlawful threats. See, e.g., *Fred Meyer Stores*, 362 NLRB No. 82, slip op. at 3–4 (2015) (store manager's angry remarks that employees did not need a union and accusing the union of stealing from the employees constituted unlawful disparagement when uttered in the context of unlawful threats and expulsion of union representatives); *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991); *Sheraton Hotel Waterbury*, 312 NLRB 304, 304 fn. 3, 305, 338 (1993), enfd. in relevant part 31 F.3d 79 (2d Cir. 1994).[7] We agree with the judge that the Re-

[4] We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) by coercively interrogating employees on January 23, 2013, as it would be cumulative of other violations found.

[5] There was no testimony about the memo or the "employee questions" to which it refers.

[6] Here and elsewhere in the record, the Respondent referred to Hostess Bakeries, a company with employees represented by the Union.

[7] Contrary to our colleague's mischaracterization of the standard for unlawful disparagement, we rely on the well-supported principle stated in *Fred Meyer Stores* that "disparaging statements uttered in the context of the commission of unfair labor practices or in response to protected concerted activity may rise to the level of unlawful threats." Above, 362 NLRB No. 82, slip op. at 3 (citing *Turtle Bay Resorts*, 353 NLRB 1242, 1278–1279 (2009), incorporated by reference 355 NLRB 706

spondent's memo unlawfully disparaged the Union by implicitly threatening that continued representation would lead to plant closure and by appealing to racial prejudice.

An employer's statement that presumes or asserts that a union would follow a certain course of action is often coercive, because the employer cannot have objective foreknowledge of what the union would choose to do. *Iplli, Inc.*, 321 NLRB 463, 468 (1996). In a memo purporting to share "facts and truths" relevant to current contract negotiations, the Respondent first emphasized the long-ago Meyer's bankruptcy and highlighted that the Union had represented Meyer's employees, who lost their jobs. The memo later alluded to the Hostess bankruptcy and suggested that a strike the Union organized among Hostess employees led to job loss and plant closure. The memo drew a parallel between the Meyer's and Hostess bankruptcies, and a causal connection between the Union and Hostess' plant closures, noting (without explanation) that the Union "appears to have plans to take [the Respondent's] employees out on strike, same as [the Union] did recently at Hostess, where over 18,000 jobs were lost and 33 bakeries and 500 retail outlets were closed."[8] In the overall context of the memo, these statements unlawfully disparaged the Union by threatening that the Union would recklessly place jobs in jeopardy and that continued representation would lead to strikes and plant closure. Cf. *Homer D. Bronson Co.*, above, 349 NLRB at 514 (finding unlawful threats of plant closure where employer told employees two facilities had closed because it was "fed up and tired of strikes" and that employees should ask themselves, "will this Union do to this new [company] what it did to the old [company]").[9]

The Respondent's statements regarding the treatment of Latino employees further support a finding of disparagement.[10] Two statements in the memo are relevant to

(2010)).

[8] The dissent finds it legally significant that the memo stated that the Union "appears" to have "plans" to call a strike. However, an employer's lack of certitude about a union's plans to call a strike does not defeat a finding of an unlawful threat of plant closure predicated upon strike activity. *Homer D. Bronson Co.*, 349 NLRB 512, 514 (2007), enfd. 273 Fed.Appx. 32 (2d Cir. 2008). The dissent attempts to distinguish *Homer D. Bronson* on the ground that the employer in that case told employees that it had previously closed two of its own plants, while the Respondent here used the Hostess plant closure simply as an example. In the dissent's view, the Respondent's memo merely "invited its employees to consider whether the Union would use its bargaining strength and economic weapons to render the Respondent uncompetitive." We disagree. The Respondent did in fact refer to its own represented employees' job loss during the Meyer's bankruptcy. And it drew a parallel between the Meyer's bankruptcy and that of Hostess, attributing job loss at Hostess to the Union's strike strategy, with no discussion of Hostess' relative competitiveness as a result of the strike. It also emphasized that employees lost jobs when represented by the Union during the Meyer's bankruptcy. We have no doubt that employees would have understood the message to be that unionization—particularly by this Union—results in job loss and plant closure.

The dissent also mistakenly claims that the judge improperly placed the burden on the Respondent to prove the veracity of its prediction. An employer bears the burden of showing its predictions are based on objective fact. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619–620 (1969); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995). Accord *Blaser Tool & Mold Co.*, 196 NLRB 374, 374 (1972). Moreover, the dissent's contention that the Respondent's statements linking the Union to plant closure are merely misrepresentations to be evaluated under *Midland National Life Insurance*, 263 NLRB 127 (1982), fails. The Board specifically stated in *Midland National* that it would "continue to protect against . . . campaign conduct, such as threats, promises, or the like, which interferes with employee free choice." Id. at 133.

[9] Contrary to the dissent's assertion, the Board has found statements to be unlawful where employers have used examples of other unions and other employers to threaten plant closure in the event of a strike. See *Eldorado Tool*, 325 NLRB 222, 223 (1997) (list of union-represented companies that had closed, with employer's name followed by question mark, found unlawful); cf. *Shelby Tissue*, 316 NLRB 646, 646 (1995) (setting aside election where the employer stated that the union represented another employer where the work force had decreased from 1200 to 650 and that the remainder would soon be out of jobs).

The cases cited by the dissent are distinguishable. For example, in *Stanadyne Automotive Corp.*, 345 NLRB 85, 89–90 (2005), enfd. in relevant part 520 F.3d 192 (2d Cir. 2008), the Board emphasized that the employer refrained from "embellishment regarding the security of its future, conveying only what had happened in the past," and drew no causal connection between the union and prior plant closures. In *Manhattan Crowne Plaza*, 341 NLRB 619 (2004), the employer made "no prediction at all" about what would happen at its own plant. In *EDP Medical Computer Systems, Inc.*, 284 NLRB 1232, 1264 (1987), the employer displayed a poster showing three unionized companies that had closed, but did not predict or suggest what the union would do at its facility. Here, by contrast, the Respondent drew a causal connection between the Union's strike and the loss of 18,000 jobs without providing any evidence for such a connection, and rather than conceding that each set of negotiations is different, the Respondent suggested, again without citing any evidence, that the Union "may" have "plans" to strike at the Respondent's facility.

[10] We do not share the dissent's concern that the Respondent's due process right was violated by the judge's consideration of racial statements in the memo. As an initial matter, the Respondent does not argue that its due process right was violated. Failure to assert denial of due process constitutes waiver of that defense. *Print Fulfillment Services LLC*, 361 NLRB No. 144, slip op. at 4 (2014) (citing Rules and Regulations of the National Labor Relations Board Sec. 102.46(b)(2)). Moreover, as our colleague himself states in his discussion of statements of futility, allegedly unlawful statements are to be evaluated in context. Accordingly, it is proper to consider the entire memo in assessing the allegation of unlawful disparagement, including the racial statements contained therein. Finally, we disagree with the dissent to the extent it appears to argue that we cannot consider the memo's accusation that the Union discriminated against Hispanics in the processing of grievances because that portion of the memo was not specifically cited in the complaint or discussed by the judge. As our colleague correctly observes, the complaint cites the memo generally as containing statements unlawfully disparaging the Union, and we have considered the memo as a whole in making our determination.

this issue. First, the memo alleges that the Union told employees that the Respondent would discriminate against Latinos if they changed their names. The memo characterizes the Union's statement as "simply false" and an attempt to "frighten our employees into allowing the union" to remain. Second, the memo accuses the Union of discriminating against Hispanic employees in the processing of grievances. Even assuming, as the dissent contends, that the Respondent's first statement is a lawful response to the Union's own campaign assertions, the Respondent's second statement went further: it reached out and accused the Union of racial discrimination. There is no indication in the record that allegations of discriminatory grievance-handling had previously been an issue in the campaign. In light of the overall context of the memo, which repeatedly accused the Union of intentionally misleading and frightening employees and recklessly endangering jobs, we find the Respondent's statement to be additional evidence of unlawful disparagement.

B. Threats of Plant Closure and Statements of Futility of Bargaining at Captive-Audience Meetings

In January and February 2013, Executive Vice President/General Manager Rickey Ledbetter delivered several captive audience speeches to groups of 150 to 170 bargaining unit employees in which he: made numerous statements that linked the Union to the closure of other companies; characterized the Union as untrustworthy, powerless in negotiations, and prone to engaging in strikes that resulted in job loss; and blamed the Union for the fact that the Respondent's represented employees earned less than its unrepresented employees. The judge found these statements unlawful. We agree.

1. Plant closure

Ledbetter's speeches were rife with statements that unions had "strangled" companies in several industries across the country "to death." Specifically, Ledbetter referred to Hostess Bakeries, automobile companies, and steel companies, adding, "[j]ust look at what happened" to those companies, and concluding, "[t]hat is one of the reasons we do not want a union here . . . ." We find that Ledbetter's statements about the effects of unionization were not "carefully phrased on the basis of objective fact" to convey his belief "as to demonstrably probable consequences beyond his control." *NLRB v. Gissel*, supra, 395 U.S. at 618. We reject the dissent's criticism of our application of *Gissel*. Contrary to the dissent's characterization, Ledbetter did not merely state his opinion that the Union had caused Hostess to go out of business. Rather, he accused unions of "strangl[ing]" companies in multiple industries, with no evidence to support that assertion. By repeating "[j]ust look at what happened," Ledbetter did not (as the dissent maintains) merely describe historic events but rather depicted a causal relationship between unionization and plant closure. When Ledbetter said that the Union's strike "resulted in the loss of over 18K jobs, the liquidation of 33 bakeries and over 500 bakery stores" and then stated, "[t]hat is one of the reasons we do not want a union here," he drew a connection between the Union's continued representation of employees and closure of the Respondent's facility, using the example of another company rather than objective facts about the Respondent. We therefore agree that Ledbetter's assertions unlawfully threatened plant closure.

Moreover, we disagree with the dissent that Ledbetter's "Job Security" speech indicated only that employees' job security was affected by "business conditions" rather than union representation. Ledbetter claimed that expenses related to the Union put jobs at risk: "It makes sense that the more money a company spends on a union, the less money it has to provide safe, steady, and secure good-paying jobs for its employees," echoing a prior speech in which he claimed that "we have to hire expensive lawyers to help us [with the Union]," which "takes time away from our efforts to maintain customers and grow." He further stated, "[j]ust because the contract is for a certain period . . . doesn't mean that the company has to stay open," and he accused the Union of "put[ting] your jobs on the line." Coupled with Ledbetter's many references to closures at other unionized plants, employees would reasonably understand the message as a threat of plant closure.

2. Futility

Ledbetter repeatedly depicted the Union as powerless, capable only of empty promises, and utterly dependent on what the Respondent would "voluntarily" give. For example, Ledbetter stated: "unions are free to promise away" and "can promise employees the moon" but "could not guarantee anything"; "the union has no power to make its promises come true"; "all a union can do is ask and all a union can get is what a company can voluntarily agree to give"; "don't be a victim of believing slick salespeople"; and "collective bargaining can, and did, result in your getting less pay than non-union employees." The Board has found nearly identical statements unlawful. See *Aqua Cool*, 332 NLRB 95, 96 (2000) (statements indicating that employees are unlikely to win anything more, and may possibly receive less, at the bargaining table than the bulk of an employer's other employees).[11] See also *Smithfield Foods, Inc.*, 347 NLRB

[11] In attempting to distinguish *Aqua Cool*, rather than engaging with

1225, 1229 (2006) (statements that "this plant will continue to get pay and benefits similar to the other plants[] . . . [The union] will not win a strike against Smithfield" found to be unlawful in context of statement, which General Counsel failed to allege as unlawful, that "the [u]nion cannot get anybody anything. The only thing the employees can get is what the company is willing to give"), petition for review denied 506 F.3d 1078 (D.C. Cir. 2007); *Ring Can Corp.*, 303 NLRB 353, 353 fn. 2 (1991) (statement that union would be powerless to prevent unlawful consequences was unlawful statement of futility of unionizing).[12]

As the judge noted, the legality of any particular statement depends upon its context. See, e.g., *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994). Our colleague maintains that Ledbetter did not make unlawful statements of futility because he at times acknowledged employees' rights under the Act and employers' statutory obligation to engage in good faith-bargaining, and he stated that the Respondent would not retaliate against employees by reducing wages, benefits, or working conditions "if the [U]nion were somehow to win the election." Unlike our colleague, we would not find that Ledbetter's intermittent recognition of employees' statutory rights negated his numerous statements of futility.[13] Accordingly, we affirm the judge's finding that the Respondent made unlawful statements of futility.

II.

The General Counsel excepts to the judge's failure to find several additional allegations. As explained below, we find merit in the General Counsel's exceptions as to the promulgation of an unlawful rule and the interrogations of employees Loudermilk, Phillips, and Marks.[14]

C. Oral Promulgation of an Unlawful Rule

The General Counsel contends that the judge failed to rule on the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by orally promulgating and maintaining an unlawful rule on January 23, 2013, when Ledbetter stated to approximately 170 unit employees, "If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately so we can address the problem." We find merit to this exception and conclude that the Respondent promulgated an unlawful rule.

To begin, we agree with the General Counsel that the Respondent's statement constituted the promulgation of a rule. The statement was made to the vast majority of unit employees, directing them to report incidents to management.[15] The prospective nature of the directive—

the fact that the Board found the statements upon which we rely to be unlawful, the dissent focuses on an independently unlawful bargaining-from-scratch statement in that case, which is irrelevant to the analysis here. Above, 332 NLRB at 96.

[12] Our colleague cites *Suburban Journals of Greater St. Louis*, 343 NLRB 157 (2004), *TCI Cablevision of Washington, Inc.*, 329 NLRB 700 (1999), and *Viacom Cablevision*, 267 NLRB 1141 (1983), each of which is an objections case involving an allegation of promise of benefit. Those cases are distinguishable not only as a doctrinal but also a factual matter. Unlike in the instant case, in *Suburban Journals* and *Viacom*, the employers provided benefit comparisons only in response to employee requests, a fact that the Board found legally significant. In *Suburban Journals* and *Viacom*, the employers provided wage and benefit data for employees to compare. Here, by contrast, the Respondent did not allow employees to draw their own conclusions based on facts; instead, it blamed collective bargaining for represented employees' lower wages. Finally, in all three cases, as in *Unifirst Corp.*, 346 NLRB 591 (2006), the employers made disclaimers of promises. In sum, we remain persuaded that the Respondent's statement about represented employees' lower wages was a statement about the futility of selecting union representation.

[13] We note that even when acknowledging employees' rights to unionize and bargain collectively, Ledbetter emphasized that the Union was unlikely to win ("if the union were somehow to win the election"), thereby further emphasizing the weakness of the Union.

[14] The General Counsel excepts to the judge's finding that it is unnecessary to pass on the allegation that the Respondent's grant of the wage increase to unit employees after it withdrew recognition from the Union violated Sec. 8(a)(3). Having found that the wage increase violated Sec. 8(a)(5), we agree with the judge. The finding of an additional violation would not materially affect the remedy. See *Raymond F. Kravis Center for Performing Arts*, 351 NLRB 143, 145 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

Member Hirozawa agrees that the wage increase violated Sec. 8(a)(5), and he would find merit in the General Counsel's argument that it also violated Sec. 8(a)(3). The Respondent made numerous promises in 2013 to reward employees with higher wages if they rejected the Union, then followed through on those promises by giving unit employees a raise after it received the decertification petition. See *Raley's*, 236 NLRB 971, 973 (1978) (post-election wage increases served the double purpose of fulfilling employer's implied promise of benefits and rewarding employees for their rejection of union), enfd. 608 F.2d 1374 (9th Cir. 1979), cert. denied 449 U.S. 871 (1980). The Respondent offered no documentary evidence to support its defense that it typically gives its unrepresented employees wage increases in September. Accordingly, the Respondent did not meet its burden to prove that the unit employees would have received the wage increase notwithstanding the decertification of the Union.

The General Counsel also excepts to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by cancelling dues checkoff in July 2013 when it withdrew its recognition from the Union. The parties' collective-bargaining agreement had expired on February 8, 2012. The General Counsel urges the Board to adopt and apply the reasoning in *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012). Although *WKYC-TV* was rendered invalid by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board subsequently overruled *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). However, as the Board held in *Lincoln Lutheran* that its decision would apply prospectively only, the allegation in this case is dismissed.

[15] Cf. *Food Services of America*, 360 NLRB No. 123, slip op. at 5 fn.

"during this election campaign"—supports the conclusion that Ledbetter promulgated a new rule.[16] The Respondent thereafter maintained the rule, as was evident when Human Resources Manager Linda Burke noted on the February 4, 2013 statements that she prepared for employees Vicki Loudermilk, Lorraine Marks, and Sandra Phillips, "We have received a complaint of potential harassment regarding the upcoming election. As Rick[ey] [Ledbetter] promised, we will investigate all complaints."

In assessing whether a rule is unlawful, the appropriate inquiry is whether the rule would "reasonably tend[] to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52, 52 (D.C. Cir. 1999). Under this standard, a rule that explicitly restricts Section 7 rights is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).[17] If the rule does not explicitly restrict Section 7 rights, the finding of a violation is dependent upon a showing of one of the following: "(1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id.

We find the rule unlawful for two reasons: employees would reasonably construe the rule to prohibit Section 7 activity, and the rule was promulgated in response to union activity. First, with respect to reasonable construction, "the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. . . . [A]n employer's invitation to employees to report instances of 'harassment' by employees engaged in union activity is [unlawful]." *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). More generally, rules linking or equating protected activity with harassment are unlawful. See, e.g., *Care One at Madison Avenue*, 361 NLRB No. 159, slip op. at 3–4 (2014); *Boulder City Hospital*, 355 NLRB 1247, 1249 (2010). Here, the rule links protected activities with harassment and threatens discipline for such conduct. Employees would thus reasonably construe the rule to prohibit Section 7 activity. Second, the rule was clearly promulgated in response to protected activity, as indicated by the specific time span of the rule ("during this election campaign"), the subject matter of the targeted "harassment" (employees' opinions about the Union), and the context in which the rule was promulgated (Ledbetter's antiunion speech). See, e.g., *Care One*, above, slip op. at 3; *Invista*, 346 NLRB 1269, 1270–1271 (2006). For these reasons, we find that the rule is unlawful.

B. Interrogations on February 4, 2013

The judge found that the Respondent violated Section 8(a)(1) when it interrogated employees about their union activities. He considered two demonstrative examples, Supervisor Kenny White's interrogation of employee Christopher Contreras and Ledbetter's interrogation of unit employees during the January 23, 2013 captive audience meeting. The General Counsel excepts to the judge's failure to rule on additional allegations that the Respondent interrogated Loudermilk, Marks, and Phillips on February 4, 2013.[18] We agree with the General Counsel, and we find the additional interrogations unlawful. In so doing, we rely on the uncontradicted and mutually corroborative testimony of Marks, Phillips, and Human Resources Manager Burke, as well as documentary evidence.

Marks and Phillips testified, and Burke admitted, that on February 4, 2013, Burke met individually with Loudermilk, Marks, and Phillips and questioned each of them. Burke used a prepared questionnaire on which she wrote the employee's responses. Each form stated: "We have received a complaint of potential harassment regarding the upcoming election. As Rick[ey] [Ledbetter] promised, we will investigate all complaints. Before you explain your involvement or lack thereof, . . . please be reminded [that] . . . dishonesty [is] a termination [sic] offense, and be reminded that the bakery is under video

11 (2014) (dismissing rule promulgation allegation where statement was made to a single employee).

[16] We reject our colleague's suggestion that Ledbetter's directive was not a rule because it was not accompanied by a threat to discipline employees if they neglected to report being harassed or threatened. Threats of discipline for noncompliance are not required for a finding of rule promulgation. Furthermore, as discussed below, the Respondent in fact disciplined Loudermilk, Marks, and Phillips on February 4 when it issued them "Personnel File Documentations" for certain union-related statements to their colleague, which the Respondent characterized as harassment. The judge found the documentations unlawful. The Respondent does not except to those findings as to Marks and Loudermilk, and we adopt his findings as to Phillips.

[17] For the reasons discussed in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 2–6 (2016), we disagree with our colleague's criticism of *Lutheran Heritage* and note that no party in this case has asked us to reconsider the *Lutheran Heritage* standard.

[18] The Respondent argues that it did not have sufficient notice of this allegation because the relevant complaint provision states: "About February 4, 2013, Respondent, by Linda Burke, during captive audience meetings at Respondent's facility, interrogated employees concerning their union activities." Although Burke's alleged interrogations on February 4, 2013, did not occur during captive audience meetings, the Respondent was on notice of the dates, the individuals, and the basic substance of the claim, and the parties fully litigated the matter. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Hi-Tech Cable Corp.*, 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997). Accordingly, we find that the Respondent had sufficient notice of this allegation.

monitoring." After questioning each employee, Burke required her to review the answers Burke had written and to sign the form.

Burke's questions were tailored to highlight the Respondent's knowledge of each employee's protected activity. Burke asked Phillips, "Did you tell [employee David Capetillo] if he would read the article he would see the shutdown ([at] Hostess) was not the union's fault?" Phillips replied, "No. I just told him to read the article. . . ." Burke asked Marks whether she made the following statements: "[Capetillo] would lose his job if he voted the union out"; "he would be the 1st to go if the union was gone"; "the Company would fire people like him if the union was gone"; and "the only reason he had a job was because his Momma and Daddy worked here." Marks denied making those statements. Burke asked Loudermilk what she spoke to Capetillo about and whether she solicited him or asked him how he intended to vote in the election. Loudermilk denied soliciting or asking Capetillo how he would vote in the election.

The lead Board case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Interrogations of employees are not per se unlawful; rather, the Board evaluates "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." Id. at 1177. In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002).

Applying the *Rossmore House* standard, we find that the interviews were unlawful interrogations. With regard to the first and second factors, at the time that the interrogations took place, the Respondent had a history of antiunion hostility and discrimination, including unilateral changes to union access rights in late 2012 and early 2013 and numerous unlawful statements during captive audience meetings in January and early February 2013. Moreover, the forms Burke prepared made explicit reference to Ledbetter's unlawful instruction to employees to report harassment during the election campaign and stated that the purpose of the meeting was to investigate a complaint of potential harassment regarding the upcoming election. The nature of the information Burke sought related directly to the union activity of Loudermilk, Marks, and Phillips, specifically whether they had discussed the Union and Capetillo's support for it. In fact, the questionnaire was unequivocally directed at the employees' union activity ("We have received a complaint of potential harassment regarding the upcoming election") and contained specific questions about conversations each had with employee Capetillo about the Union. It also emphasized that the employees could be discharged if they did not respond truthfully to the complaint allegations and reminded the employees that their activities were under video surveillance. Thus, the threat of discipline was clear. See *ATC of Nevada*, 348 NLRB 796, 797 (2006) (questioning conducted under express threat of suspension constituted unlawful interrogation), enfd. 309 Fed.Appx. 98 (9th Cir. 2009).

The third and fourth *Rossmore House* factors also weigh in favor of a finding of unlawful interrogations. Burke was the head of the human resources department, a position that would reasonably convey to employees that she was responsible for personnel decisions. See *Boulder City Hospital*, above at 1247. Burke communicated the gravity of the conversations she had with the employees by summoning them individually to her office, *Kellwood Co.*, 299 NLRB 1026, 1026–1027 (1990), enfd. 948 F.2d 1297 (11th Cir. 1991), and creating a written record of their statements.[19] Under these circumstances, we conclude that the Respondent unlawfully interrogated Loudermilk, Marks, and Phillips on February 4, 2013.

AMENDED CONCLUSIONS OF LAW

Add the following to Conclusion of Law 4to the judge's decision.

"h. Orally promulgating and maintaining a rule, which instructs employees to notify the Respondent if they 'are harassed or threatened on any basis during this election campaign.'"

AMENDED REMEDY

In addition to the remedies proposed by the judge, we shall require the Respondent to compensate Lorraine Marks for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the

[19] The record reveals that Marks and Phillips were active supporters of the Union. That is the sole *Rossmore House* factor weighing against a finding of unlawful interrogation; however, it is not dispositive, particularly where, as here, the interrogations took place at a time when the Respondent was committing other unfair labor practices. See *Norton Audubon Hospital*, above, 338 NLRB at 321 ("[T]he fact that [the employee] was an open union supporter . . . does not, under all the circumstances[,] . . . negate the coercive nature of [the] interrogation."). Cf. *Scheid Electric*, 355 NLRB 160, 161 (2010) (where respondent interrogated union steward as to whether he would remain with respondent if it went nonunion, steward's "status as an open union supporter . . . would reinforce, rather than ameliorate, the coercive effect" of question).

date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Further, having found that the Respondent orally promulgated and maintained an unlawful rule, we shall order the Respondent to rescind the rule and notify its employees in writing that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, Southern Bakeries, LLC, Hope, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline, job loss, closure of the facility, or other unspecified reprisals, if they engage in activities on behalf of Bakery, Confectionery, Tobacco and Grain Millers Union, Local 111 (the Union) or other protected concerted activities.

(b) Coercively interrogating employees about their union or other protected concerted activities.

(c) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(d) Threatening employees that retaining the Union as their collective-bargaining representative would be futile.

(e) Promising employees improved wages and other unspecified benefits, in order to discourage them from retaining the Union as their collective-bargaining representative.

(f) Disparaging the Union, while appealing to racial prejudice, in order to discourage employees from retaining the Union as their collective-bargaining representative.

(g) Orally promulgating and maintaining an overly broad rule in response to union activity instructing employees to report harassment and threats on any basis during the election campaign, regardless of whether they were for or against the Union.

(h) Commencing disciplinary investigations against, issuing written warnings and personnel file documentations to, and suspending employees because of their support for and activities on behalf of the Union.

(i) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

(j) Unilaterally granting a wage increase to its unit employees, without providing the Union notice and an opportunity to bargain.

(k) Unilaterally implementing new rules regarding the Union's access to unit employees at the plant, and barring the Union from entering the plant, without first notifying the Union and giving it an opportunity to bargain.

(l) Unilaterally installing surveillance cameras in the break area, without first notifying the Union and giving it an opportunity to bargain.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and sanitation employees employed by the Company at its Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective-bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

(b) On request by the Union, rescind the wage increase to bargaining unit employees that was implemented in September 2013, and bargain with the Union before implementing future wage and benefit increases for unit employees, provided, however, that nothing in this Order shall be construed as requiring or authorizing the Respondent to cancel any unilateral change that benefited the unit employees unless the Union requests such action.

(c) Restore the plant access policy, including the windowed wall that divided the break area, which was in effect prior to March 8, 2012.

(d) Remove the surveillance cameras that were installed in the break area, and bargain with the Union before installing such cameras in the break area in the future.

(e) Within 14 days from the date of this Order, rescind, in writing, the orally promulgated and maintained rule that unlawfully instructs employees to report harassment and threats on any basis during the election campaign, regardless of whether they were for or against the Union, and, within 3 days thereafter, notify employees in writing that this rule has been rescinded.

(f) Make Lorraine Marks whole for any loss of earnings and other benefits resulting from her suspension, in the manner set forth in the judge's decision as amended in this decision.

(g) Compensate Lorraine Marks for the adverse tax consequences, if any, of receiving a lump-sum backpay

award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary investigations of Sandra Phillips, Lorraine Marks, and Vicki Loudermilk, Marks' and Loudermilk's Personnel File Documentations, Phillips' written warning, and Marks' suspension, and, within 3 days thereafter, notify the affected employees in writing that this has been done and that the investigations, Personnel File Documentations, written warning, and suspension will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Hope, Arkansas, facility copies of the attached notice marked "Appendix"[20] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since March 8, 2012.

(k) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be read to the employees in English by Rickey Ledbetter (or the current executive vice president/general manager), in the presence of a Board agent, or, at the Respondent's option, by a Board agent in that official's presence, and shall also be read, by interpreters, in Spanish.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 4, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I join my colleagues in finding that Southern Bakeries, LLC (Southern Bakeries or the Respondent) committed a number of unfair labor practices while negotiating with the Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111 (the Union) for a successor collective-bargaining agreement during the pendency of a decertification petition.[1] However, I respectfully dissent from the

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Specifically, I join my colleagues in finding that the Respondent violated Sec. 8(a)(1) by creating an impression that employees' union activities were under surveillance, by coercively interrogating employee Christopher Contreras about his union sentiments, and by promising job applicant Jeremy Woods higher wages were he to vote against the Union in a decertification election; Sec. 8(a)(3) by disciplining employees Sandra Phillips and Lorraine Marks because of their union activities; and Sec. 8(a)(5) by changing the access rights accorded to union agents, by withdrawing recognition from the Union, and by thereafter unilaterally granting unit employees a wage increase. I also join my colleagues in dismissing complaint allegations that the Respondent violated Sec. 8(a)(1) by engaging in surveillance of employees' union activities and Sec. 8(a)(5) and (1) by cancelling dues checkoff after the parties' collective-bargaining agreement expired. With regard to the latter issue, I would find the Respondent's cancellation of dues checkoff after contract expiration lawful under *Bethlehem Steel*, 136

findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) by allegedly (i) disparaging the Union, (ii) threatening to close the plant if employees failed to decertify the Union, (iii) threatening that it would be futile for employees to retain the Union, and (iv) informing employees that it would like to know if they were threatened or suffered harassment during the decertification-election campaign.

In my view, the Board majority errs in several respects. Contrary to Section 8(c) of the Act, my colleagues improperly infer unlawful motivation from permissible statements of opinion.[2] Contrary to longstanding Board precedent, the majority improperly makes findings regarding the accuracy of statements made during an election campaign.[3] I believe my colleagues improperly regard lawful statements of fact as unlawful threats, and they erroneously rely on inferences that employees may draw from events that have been accurately (and lawfully) described. And I believe my colleagues, by improperly penalizing the Respondent's invitation for employees to report harassment and threats, unreasonably limit the right of employees to protection from harassment based on their sentiments regarding union representation, and my colleagues also unreasonably limit the right of employers to address such harassment. Accordingly, as to these issues, I respectfully dissent.

Facts

The Respondent operates a commercial bakery in Hope, Arkansas. The bakery was previously owned and operated by Meyer's Bakeries, Incorporated. In early 2005, Meyer's Bakeries declared bankruptcy, closed the bakery, and terminated its work force. In March 2005, the Respondent purchased certain assets from Meyer's Bakeries, including the bakery in Hope, and began business as Southern Bakeries. The Respondent continued, without substantial change, Meyer's Bakeries' business operations, and a majority of the workers hired by the Respondent had been employed by Meyer's Bakeries. Accordingly, the Respondent, as a legal successor to Meyer's Bakeries under well-established law,[4] immediately recognized the Union as the employees' collective-bargaining representative and negotiated a series of collective-bargaining agreements, the most recent of which expired on February 8, 2012.

During the "window period" before that agreement expired, an employee, Nadine Pugh, filed a decertification petition with the Board on December 7, 2011.[5] That petition never resulted in an election because of blocking charges the Union filed with the Board.[6] A second decertification petition was filed by employee John Hankins on May 23, 2012. An election was scheduled for February 2013, but it, too, was never conducted because of additional blocking charges filed by the Union.

In late 2012, shortly before the events at issue here, the Bakery, Confectionary, Tobacco and Grain Millers Union (BCTGM) engaged in a highly publicized economic strike against Hostess Brands, which had recently gone into bankruptcy. See, e.g., *Hostess, Still at Odds with Union, Moves Ahead with Liquidation*, Wash. Post, Nov. 21, 2012, at A12 (2012 WLNR 24756767). Although the Teamsters, which represented nearly 7000 Hostess Brands' employees, agreed to concessions in an effort to keep Hostess in business, the BCTGM did not.[7] In No-

NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), to which I would adhere. See *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 9–15 (2015) (Members Miscimarra and Johnson, dissenting in part).

Having found that the Respondent violated Sec. 8(a)(5) when it unilaterally granted bargaining-unit employees a wage increase following its unlawful withdrawal of recognition from the Union, I join Chairman Pearce in finding it unnecessary to reach and decide whether the wage increase additionally violated Sec. 8(a)(3), since any additional 8(a)(3) finding would not materially affect the remedy. Similarly, having found that the Respondent coercively interrogated Contreras and unlawfully promised Woods higher wages if he opposed the Union, I find it unnecessary to decide whether the Respondent engaged in any other coercive interrogations or unlawfully promised to improve wages or other terms and conditions of employment at captive-audience meetings, since any additional violation findings would not affect the remedy.

[2] Sec. 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[3] See *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

[4] See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

[5] More than 60 days and fewer than 90 days before the expiration date of a collective-bargaining agreement, a representation petition may be filed by an employee seeking to decertify the union, i.e., to terminate its status as the employees' bargaining representative, or by a rival union seeking to supplant the incumbent union. See *Leonard Wholesale Meats*, 136 NLRB 1000 (1962). This 60-90 day period is called the "window period."

[6] Subject to certain exceptions, where a representation petition has been filed with the Board and a party to the petition subsequently files an unfair labor practice charge alleging conduct that, if proven, would interfere with employee free choice, the Board holds in abeyance the processing of the pending election petition. Such a charge is called a "blocking" charge. For a discussion of my views and those of former Member Johnson concerning the Board's blocking-charge policy, see "Representation-Case Procedures; Final Rule," 79 Fed. Reg. 74308, 74455–74456 (Dec. 15, 2014).

[7] See "Hostess Brands closing for good," CNN Money (Nov. 16, 2012) (http://money.cnn.com/2012/11/16/news/companies/hostess-closing/ (last visited July 28, 2016)). Although the Teamsters blamed the closure on "mismanagement by Hostess executives," "it was also critical of the decision of Bakers' union [BCTGM], although it did not identify the union by name. 'Unfortunately, the company's operating

vember 2012, Hostess Brands closed all its bakeries and terminated approximately 18,000 workers nationwide, citing the economic pressure placed on it by the BCTGM. It is against this background that the Respondent spoke to employees about collective bargaining, strikes, and job security during the decertification campaign in early 2013.

Discussion

A. Alleged Disparagement of the Union

The judge found that the Respondent violated Section 8(a)(1) of the Act by disparaging the Union in a memo to employees that it posted on January 17, 2013.[8] The analytical framework that governs alleged unlawful disparagement under the NLRA starts with Section 8(c) of the Act. Reflecting free speech guarantees conferred by the First Amendment, Section 8(c) gives employers the right to express "views, argument, or opinion" about union-related matters, provided such expressions do not contain any threat of reprisal or force or promise of benefit. See Section 8(c) (quoted in fn. 2, supra); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). It is well settled that "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006); see also *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) ("'Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).'") (quoting *Sears, Roebuck & Co.*, 305 NLRB 193 (1991)). Moreover, the Board does not police the accuracy of statements made during an election campaign. *Midland National Life Insurance*, supra, 263 NLRB at 133.[9]

The Respondent's January 17 memo was styled as a response to recent employee questions and described the then-ongoing negotiations between the Respondent and the Union. The memo began with a summary of the history, set forth above, of the Respondent purchasing the closed bakery from bankrupt Meyer's Bakeries, extending recognition to the Union, and negotiating several collective-bargaining agreements. In the memo, the Respondent asserted that the Union had recently made certain inaccurate statements about the ongoing contract negotiations. Specifically, the Respondent denounced as "false" the Union's claim that the Respondent would never negotiate over pensions. The memo pointed out that the Union had never proposed that the Respondent's union-represented employees be covered by a union-sponsored pension plan, and it emphasized that all its employees, union and nonunion alike, participate in a 401(k) retirement savings plan.

Additionally, the memo criticized as "misleading and false" the Union's claim that nonunion employees "cannot file a grievance and will be fired for any reason." The memo stated that nonunion employees lodge grievances by utilizing the Respondent's Open Door Policy. The memo indicated that the Respondent "make[s] every effort to fully consider all cases of employee discipline, including discharge," and it stated that employees "do not need a union grievance procedure in order to be treated fairly."

The Respondent further explained that the NLRA requires the parties to bargain in good faith and that, if the parties were to reach impasse, the Respondent could lawfully implement its final offer. The memo stated that the Union "cannot guarantee anything," but it can exert economic pressure in the form of a strike. The memo further stated that "[t]he union appears to have plans to take our employees out on strike here in Hope, same as they did recently at Hostess, where over 18,000 jobs were lost and 33 bakeries and 500 retail outlets were closed." Finally, the Respondent's memo countered any suggestion that it would retaliate against Hispanic employees.

In my view, the memo does not contain any threat of reprisal or force or any promise of benefit. Therefore, Section 8(c) prohibits the Board from finding that the memo constitutes or is evidence of an unfair labor practice, including alleged unlawful disparagement of the Union. See *Children's Center for Behavioral Development*, supra, 347 NLRB at 35. The judge, whose decision the majority adopts, found that the memo contained a threat to close the bakery, based on its statement that "the union appears to have plans to take our employees

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and financial problems were so severe that it required steep concessions from a variety of stakeholders but not all stakeholders were willing to be constructive,' said Ken Hall, the Teamsters' Secretary-Treasurer." Id.

[8] Jt. Exh. 25.

[9] Under *Midland*, the Board will intervene only in cases "where a party has used forged documents which render the voters unable to recognize propaganda for what it is." Id. No forged document is at issue here.

Citing *Fred Meyer Stores*, 362 NLRB No. 82 (2015), the majority posits that an employer's statements otherwise protected by Sec. 8(c) of the Act and the First Amendment lose their protected status by mere proximity to unfair labor practices. I disagree with this view, and I cannot improve on its characterization by former Member Johnson, who aptly described it as a "virus-type theory by which unlawful conduct apparently infects mere statements of opinion and morphs them into implied threats," and who rejected it as "a work around of basic First Amendment principles [that] does not comport with the express statutory language that only permits us to find speech unlawful if it *contains* a threat or promise." *Fred Meyer Stores*, 362 NLRB No. 82, slip op. at 6–7 (Member Johnson, dissenting in part).

out on strike" and its reference to the BCTGM's well-publicized strike at Hostess.[10] For several reasons, I respectfully disagree with the finding that the memo constituted an unlawful threat to close the bakery.

First, the statements the judge characterized as a threat did not describe what the *Respondent* might do. They described what the *Union* might do. For a statement to constitute a threat, it must at least purport to describe an action *the speaker or author* of the statement may take. The author of the January 17 memo was the Respondent, and the memo contained statements regarding what the Union might do. It stated that "*[t]he union appears to have plans to take our employees out on strike here in Hope*, same as they did recently at Hostess, where over 18,000 jobs were lost and 33 bakeries and 500 retail outlets were closed" (emphasis added). I do not believe this statement can fairly be characterized as a threat by the Respondent. It was not unlawful for the Respondent to express its opinion that "the Union appears to have plans to take our employees out on strike here in Hope." The next part of the sentence—observing that the Union had engaged in a strike at Hostess—also was not unlawful. Finally, it was not unlawful for the sentence to conclude by accurately stating that, after the Hostess strike, "over 18,000 jobs were lost and 33 bakeries and 500 retail outlets were closed." These statements, whether construed individually or together, cannot reasonably be characterized as a threat by the Respondent regarding actions that the Respondent would take in the event of a strike. A lawful statement is not rendered unlawful merely because it accurately describes facts that may prompt employees to question whether similar events could occur if the same Union engages in similar conduct where those employees work.[11]

Second, the memo did not claim that a strike was inevitable if employees voted to keep the Union. It stated that the Union "appears" to have "plans" to call a strike. Appearances may be misleading, and plans may and do change. Moreover, this was a statement made in the course of a decertification-election campaign, and it is well established that the Board does not "probe into the truth or falsity" of statements made during election campaigns. *Midland*, supra, 263 NLRB at 133.[12]

Third, the memo did not state that if a strike occurred, the Respondent would close the Hope bakery in retaliation against employees for engaging in protected activities. Instead, it referred to historical facts: the BCTGM struck Hostess Brands, and Hostess Brands went out of business. To state facts about what *other parties*—Hostess Brands and the BCTGM—have done *in the past* is qualitatively different from stating what *the Respondent* may or would do in the event of a strike *in the future*. The Board cannot reasonably find that the Respondent unlawfully threatened employees that it would close the bakery in the future when the alleged "threat" consisted of accurately describing what a different party did in the past. See, e.g., *Stanadyne Automotive Corp.*, 345 NLRB 85, 89 (2005) (finding no threat where employer, "[b]y conveying events that had already occurred, . . . attempted to inform employees of the potential negative effects of their upcoming vote"), enfd. in relevant part 520 F.3d 192 (2d Cir. 2008); *Manhattan Crowne Plaza*, 341 NLRB 619, 619–620 (2004) (finding no threat where employer "provided a recent, concrete example of a negative outcome for employees who were represented by the same union"); *Medical Computer Systems, Inc.*, 284 NLRB 1232, 1264 (1987) (finding no threat where employer displayed poster entitled "Is this job security?" depicting unionized companies that had closed; employer had a "right to . . . stat[e] 'economic reality' by informing employees of these events").[13]

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[10] The judge faulted the Respondent for failing to prove that the Union in fact had concrete plans to strike the Respondent. However, it is the General Counsel who bears the burden of proving unlawful denigration, and the General Counsel failed to prove that the Union did *not* appear to have plans to strike. In finding a violation here, my colleagues reverse the burden of proof. Contrary to their assertion, the Respondent's statement—that the Union "appears" to have "plans" to strike—was not a prediction that a strike would occur. Accordingly, the Respondent was not obligated to prove an objective basis to support its statement.

[11] To support their conversion of lawful statements of historical fact into unlawful implied threats of future action, the majority cites *Eldorado Tool*, 325 NLRB 222 (1997). I agree with the views expressed by then-Chairman Gould in his partial dissenting opinion in that case:

> To be sure, it is a violation of the Act for an employer to threaten, either directly or indirectly, to close its facility if its employees select a union as their collective bargaining representative. It is not unlawful, however, for an employer to make reference to what the employer perceives to be a union's record at other plants. Such references are a fact of industrial life, frequently part of the rough and tumble of electioneering, and the Board cannot and should not be responsible for policing the objective considerations relied on by an employer. If an employer's statements are not complete or are inaccurate, it is for the union to respond.

325 NLRB at 225.

[12] My colleagues note that the Board in *Midland* assured that it would continue to protect against threats and promises made in the course of an election campaign. In other words, in their view *Midland* does not apply here. But this merely begs the question whether the Respondent's January 17 memo contained threats. I believe it did not, for the reasons explained in the text.

[13] *Homer D. Bronson Co.*, 349 NLRB 512 (2007), enfd. 273 Fed.Appx. 32 (2d Cir. 2008), relied on by the majority, is distinguishable. In that case, the employer told employees that it had previously closed two of its other unionized facilities because it was "fed up and tired of strikes" before asking them to contemplate whether the union would do to the company what it had done before. Id. at 514. Here, unlike in *Homer D. Bronson*, the Respondent did not accompany its

The judge separately found that the memo's criticism of the Union constituted unlawful disparagement after finding that the memo contained an "appeal to racial prejudice." Preliminarily, I observe that the complaint did not allege, and the General Counsel's attorney did not argue in her post-hearing brief to the judge, that the Respondent's January 17 memo contained an appeal to racial prejudice.[14] The judge came up with that theory of violation sua sponte, which I believe improperly infringes on the Respondent's due process rights.[15] In any event, the judge's finding is erroneous.

In relevant part, the January 17 memo stated:

> The union statement that [Southern Bakeries] is "gonna fire hispanics (Latino employees) if they change their names" simply makes us sad and is entirely false. We believe the union feels they can frighten our employees into allowing the union to continue to control their working lives at [Southern Bakeries]. *In fact, [Southern Bakeries] values the diversity of our workforce. We are truly an Equal Opportunity Employer. We welcome all applicants, including Latino applicants and employees as evidenced by the large number of Latino employees that are currently a part of our team*.[16]

The judge faulted the Respondent for failing to prove at the hearing that the Union in fact told employees that the Respondent would fire Latino employees if they changed their names. As explained above, however, under *Midland*, the Board does not inquire into the accuracy of parties' campaign-related speech. *Midland National Life Insurance*, supra, 263 NLRB at 133. Moreover, even if it were proper to evaluate the truthfulness of Respondent's statement, the burden of proving that the Respondent unlawfully disparaged the Union rests with the General Counsel, and judge's approach erroneously reverses the burden of proof by requiring the Respondent to prove the factual accuracy of its campaign statements rather than requiring the General Counsel to prove their inaccuracy. That approach is irreconcilable with the Act,[17] and it impermissibly has a chilling effect on protected speech.[18] In any event, regardless whether the Union actually made the statement attributed to it (a matter on which the record is silent), the memo does not contain an appeal to racial prejudice. To the contrary, the memo reflects an effort by the Respondent to *refute* any accusation that it would treat employees differently based on race or ethnicity, and it describes the Respondent as an "Equal Opportunity Employer."[19] I believe it turns the record evidence upside down to characterize a statement *disclaiming* discrimination based on race or ethnicity as a threat *to discriminate* based on impermissible considerations.[20]

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statement that it appeared the Union had plans to call a strike by saying that it had already closed a unionized facility because it was "fed up" with protected strike activity. Rather, the Respondent pointed to a recent high-profile strike called by the BCTGM and the fact that the struck employer subsequently went out of business. The employer in *Homer D. Bronson Co.* implicitly threatened a retaliatory plant closure. In contrast, the Respondent here invited its employees to consider whether the Union would use its bargaining strength and economic weapons to render the Respondent uncompetitive in the industry.

[14] Regarding the January 17 memo, the complaint advanced two allegations: (i) that the memo threatened employees with plant closure, and (ii) that the memo unlawfully accused the Union of making statements that were "simply false." Counsel for the General Counsel's post-hearing brief to the judge clarified the latter allegation, stating that the January 17 memo "contains the following statement which unfairly disparaged and undermined the Union: 'The union statement that "SBLLC [Southern Bakeries] rejects union representative visits to the Plant" is simply false as evidenced by the meeting you just had with the visitors from the International BCTGM union from Maryland.'" Nothing in either the complaint or the theory of the case as argued to the judge by the General Counsel's attorney so much as hinted that the January 17 memo contained an appeal to racial prejudice.

[15] Because the Respondent does not except on due process grounds to the judge's sua sponte finding that it appealed to racial prejudice by refuting the allegation that it was "gonna fire hispanics," I reach the merits of that issue.

[16] Jt. Exh. 25 at 4 (emphasis added).

[17] Sec. 10(c) of the Act requires that unfair labor practice findings be supported by a "preponderance" of the evidence.

[18] See Sec. 8(c) of the Act, quoted in fn. 22, supra.

[19] *Holiday Inn of Chicago-South*, 209 NLRB 11 (1974), cited by the judge, is distinguishable. In that case, the Board found that an employer violated Sec. 8(a)(1) during a campaign by making a "threat to the employees either that current part-time employees would be replaced by blacks if the [u]nion won the election or that they would have to work alongside blacks, a condition which certain employees might consider unpleasant." Id. at 11. In contrast, the Respondent here did not make any threat or any appeal to racial bigotry.

[20] The *only* statement in the Respondent's January 17 memo that the judge found constituted an "appeal to racial prejudice" amounting to unlawful disparagement of the Union is the memo's assertion that the Union had misleadingly alleged that the Company is "gonna fire hispanics (Latino employees) if they change their names." As I pointed out above, the complaint did not allege and the General Counsel did not argue that this or any other statement in the January 17 memo constituted an appeal to racial prejudice. Aware, no doubt, that the judge gratuitously made an unsolicited unfair labor practice finding that had not even been alleged or argued, the General Counsel's attorney, when she filed cross-exceptions to the judge's decision, did not contend that the judge should have found that *additional statements* also constituted an appeal to racial prejudice, nor did she identify or present any arguments regarding other statements allegedly involving race in her answering brief to the Respondent's exceptions.

Nonetheless, the majority doubles down on the judge's infringement on the Respondent's due process rights by identifying *yet another* alleged appeal to racial prejudice based on the memo's statement that the Respondent had "raised concerns [to the Union] that the Local was discriminating against Hispanics through targeted grievance allegations." The General Counsel never argued to the judge or the Board that the Respondent's statement was inaccurate or constituted an appeal to racial prejudice or tended to disparage the Union. Perhaps the General Counsel declined to make any such allegations because the Respondent did in fact raise those concerns to the Union and had a rea-

For these reasons, I believe the disparagement allegation is unsupported by the record and must be dismissed.

B. Alleged Threats of Plant Closure and Futility at Captive-Audience Meetings

The majority finds that the Respondent, during captive-audience meetings, threatened to close the Hope bakery if employees failed to decertify the Union. I believe this finding is contradicted by the record evidence regarding what the Respondent's representatives actually stated.

There is no question that the Respondent made statements that repeatedly expressed the view that it opposed union representation and that described other employers and workplaces where represented employees experienced layoffs or closings. However, even if employees might be persuaded to disfavor representation because of such statements, this does not mean the statements constituted unlawful threats to close the bakery if employees retained the Union. As the Supreme Court stated in *NLRB v. Gissel Packing Co*., supra, 395 U.S. at 617–618, "an employer's free speech right to communicate his views to his employees is firmly established *and cannot be infringed by . . . the Board*," and "an employer is free to communicate to his employees *any of his general views about unionism or any of his specific views about a particular union*, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit'" (quoting Sec. 8(c)) (emphasis added).

The most strongly worded statements were contained in the "Kick-Off Speech" delivered by Executive Vice President/General Manager Rickey Ledbetter:

> From an economic standpoint, we do not want a union because we believe it drags our Company down in so many ways. If we can't meet or beat the competition, we can't survive. Just look at what happened to the Hostess Bakeries, Automobile companies and Steel companies. Unions strangled these companies to death. To compete, especially in our business we have to sell a better product at a better price delivered in a more dependable manner than our competitors.
>
> . . . .
>
> Just look at what happened to Meyer's Bakeries and most recently at Hostess. At Hostess, a union strike by the BCTGM resulted in the loss of over 18K jobs, the liquidation of 33 bakeries and over 500 bakery stores. That is one of the reasons we do not want a union here . . . .[21]

Ledbetter obviously sought to persuade his audience to vote against the Union. However, he did not state or imply that the Respondent would close the Hope bakery if its employees voted to retain the Union as their bargaining representative. Most of his statements concerned the past, not the future—e.g., "[j]ust look at what *happened* to the Hostess Bakeries, Automobile companies and Steel companies. Unions *strangled* these companies to death." Ledbetter's forward-looking statements linked Southern Bakeries' survival to its ability to compete. He stated that "[i]f we can't meet or beat the competition, we can't survive," and "[t]o compete, . . . we have to sell a better product at a better price delivered in a more dependable manner than our competitors." To be sure, Ledbetter referred to unionized employers that had not survived, including Hostess Brands. As stated above, however, it is not an unfair labor practice to cite historical facts concerning unionized employers that have gone out of business. See, e.g., *Stanadyne Automotive*, supra; *Medical Computer Systems*, supra. Ledbetter also expressed his opinion that the BCTGM's strike at Hostess Brands resulted in that company going out of business, but he did not predict that the Union would strike *Southern Bakeries*,[22] nor did he say that if it did, *Southern Bakeries* would go out of business. See, e.g., *Stanadyne Automotive*, supra (no unlawful threat where employer stated that strikes at three of its other plants had resulted in plant closure but did not make threats or predictions

sonable basis for doing so. We simply do not know on this record because the issue was never raised. Cf. *Smithfield Foods, Inc.*, 347 NLRB 1225, 1227 fn. 13 (2006) (finding that General Counsel failed to put employer on reasonable notice of what portions of videotaped speeches were alleged to violate the Act), petition for review denied 506 F.3d 1078 (D.C. Cir. 2007). Of course, potential discriminatory treatment of unit employees by the Union was a perfectly legitimate campaign topic. Yet the majority finds that the Respondent violated the Act by advising employees that it had raised such concerns to the Union because, according to my colleagues, "there is no indication in the record that allegations of discriminatory grievance-handling had previously been an issue in the campaign." But it does not violate the Act for somebody to be the first to raise a campaign issue. Moreover, assuming for argument's sake that the Respondent's campaign-related statement that it had raised concerns of discriminatory grievance-handling to the Union was untruthful (and there is no basis in the record to so conclude), it was for the Union to correct the record, because the Board has held that the legality of campaign statements does not turn on their truth or falsity. *Midland National Life Insurance*, supra. Consequently, for both procedural and substantive reasons, I think that the majority errs in relying on the statement regarding discriminatory grievance-handling in finding that the Respondent unlawfully disparaged the Union.

[21] Jt. Exh. 7 at 3–4.

[22] Besides, any statement by the Respondent concerning what *the Union* may choose to do would not be a prediction or threat concerning what *the Respondent* may do. As explained in the text, above, statements about what *another party* may do cannot constitute threats, since a threat is a statement concerning what *the speaker* may or will do.

about the future).

Similar to the "Kick-Off Speech," in which the Respondent cited its ability to "meet or beat the competition" as the key to its survival, the Respondent gave a "Job Security" speech indicating that employees' job security was impacted by "business conditions," *not* by whether employees chose to be represented by a union. The Respondent also emphasized its "general commitment to dealing with all our employees in a fair and consistent manner and respecting their dignity, *with or without a union*."[23]

In sum, the Respondent emphasized that the bakery industry is competitive, opined that unions are an impediment to efficiency, pointed to past instances where unionized companies had gone out of business, and urged employees to decertify the Union. I do not believe the record proves that the Respondent threatened that it would go out of business or implied that it would close the bakery in retaliation if its employees chose to retain union representation. For these reasons, I would dismiss the allegations that the Respondent threatened employees with plant closure.[24]

In my view, there is no merit in my colleagues' contention—in reliance on *NLRB v. Gissel*, 395 U.S. at 618—that Ledbetter's statements were unlawful because they "were not 'carefully phrased on the basis of objective fact' to convey his belief 'as to demonstrably probable consequences beyond his control.'" The false premise underlying this argument is that the statement made by Ledbetter (which, according to my colleagues, was not "carefully phrased") constituted a *prediction* that the Hope bakery would close unless employees decertified the Union. Here, it is important to understand precisely what the Supreme Court stated in *Gissel*, supra. The Court did *not* hold or suggest that *all* campaign-related statements must be "carefully phrased on the basis of objective fact" and must relate to "probable consequences beyond [an employer's] control." Id. To the contrary, as described by the Supreme Court, the "carefully phrased" requirement pertains only to a specific type of campaign-related statement—i.e., a "prediction as to the precise effects [the employer] believes unionization will have on his company." Here is the complete quotation from the Supreme Court's *Gissel* opinion:

> [A]n employer is free to communicate any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a *prediction as to the precise effects he believes unionization will have* on *his* company. *In such a case*, however, the *prediction* must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.[25]

Here, Ledbetter never made a "prediction" as to any "precise effects" that Ledbetter believed "unionization will have on his company."[26] Rather, Ledbetter merely conveyed general views about unionization (e.g., that unions have "strangled" companies in various industries) and views on a particular union (that the BCTGM had contributed to the demise of Hostess). Ledbetter made no prediction regarding the precise effects that continued unionization would have on the Hope bakery, and he certainly did not either state or predict that the Hope bakery would close unless employees voted to decertify the Union. In my view, the majority erroneously imposes a blanket "carefully worded" requirement on mere campaign statements. This is unsupported by the Supreme Court's decision in *Gissel* and contrary to the protection afforded to campaign statements under Section 8(c) of the Act.

Finally, for similar reasons, I would reverse the judge's related finding that the Respondent unlawfully threatened employees that retaining the Union as their bargaining representative would be futile. An employer violates the Act by conveying to employees that it would be futile to select or retain a union when it declares that it will not recognize the union or bargain with it in good faith. See, e.g., *Winkle Bus Co.*, 347 NLRB 1203, 1204 (2006) ("An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means.") (citing *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002)); *Venture Industries*, 330 NLRB 1133, 1133 (2000) (manager unlawfully conveyed that unionization would be futile by telling employees that "as far as he was concerned the plant would never be a union shop" during speech in which he also threatened loss of jobs and loss of promotional opportunities). The Respondent made no such statements here.

[23] Jt. Exh. 10 at 4 (emphasis added).

[24] *Federated Logistics and Operations*, 340 NLRB 255 (2003), rev. denied 400 F.3d 920 (D.C. Cir. 2005), cited by the judge, is distinguishable. In that case, unlike here, the respondent told employees that, if they unionized, "we would start from zero and would negotiate from that" and that "if a strike occurred the operation could be shut down and moved to another of the Respondent's facilities in 3 days . . . ." Id. at 255. In contrast, the Respondent in the present case did not make any "bargaining from scratch" statements, nor did it suggest that it might shut down or relocate if the Union called a strike.

[25] *Gissel*, supra, 395 U.S. at 618 (emphasis added).

[26] Id. (emphasis added).

The Respondent's captive-audience speeches were replete with statements acknowledging its legal duty to recognize and bargain in good faith with the Union if the employees chose to retain it. This is illustrated by the following examples:

- "If a majority of voters decide that they want [the Union] to continue to speak on their behalf, you will remain represented by this union."
- "The NLRB is a federal government agency that makes sure all employees in the company have the right to join or stay in a union if the majority of them wants to and that employees also have the right not to join or remain in a union if at least half of them don't want to."
- "Please remember that if [the Union] wins this election it would still represent you regarding your job, including negotiating your wages and benefits, even if you chose not to join the union or voted against it."
- "The National Labor Relations Act says that 'good faith bargaining' requires the company to meet with the union upon reasonable request, display an open mind, and attempt to reach a mutually acceptable contract."
- "[E]verything you have in the way of wages, hours, benefits, and working conditions is always on the table during negotiations and subject to change favorably or unfavorably depending how the bargaining goes."
- "I want to stress that if the union were somehow to win the election and continue to represent you, we wouldn't reduce wages, benefits, or working conditions just because the union won."

These and similar statements reasonably convey the sentiment that, if employees retained the Union, the Respondent would continue to bargain in good faith with the Union, employees' terms and conditions of employment could change depending on the outcome of those good-faith negotiations, and those changes could be either favorable or unfavorable, but the Respondent would not retaliate by making unfavorable changes "just because the [U]nion won." I believe these statements fairly described the process of collective bargaining, and I do not believe they provide reasonable support for a finding that the Respondent unlawfully indicated it would be futile for employees to vote to retain the Union in the decertification election.

I believe there is no merit in my colleagues' finding that the Respondent unlawfully threatened employees that continued union representation would be futile. Here, the majority relies on Ledbetter's statements that "unions are free to promise away" and "can promise employees the moon" but "could not guarantee anything," "the union has no power to make its promises come true," "all a union can do is ask and all a union can get is what a company can voluntarily agree to give," "don't be a victim of believing slick salespeople," and "collective bargaining can, and did, result in your getting less pay than non-union employees." The last of these statements was a lawful statement of historical fact, not a threat of futility if employees voted to retain the Union or promise of better wages if they voted to decertify the Union.[27] And especially when the remaining statements are evaluated in context—recognizing that the Respondent acknowledged its statutory obligation to bargain in good faith and emphasized the Union's ability to utilize the strike weapon in support of its bargaining demands—the Board cannot reasonably find that the Respondent asserted that continued union representation would be futile or that the Respondent would refuse to engage in good-faith bargaining. Certainly, the statements relied upon by my colleagues constitute "views, argument, or opinion" aimed at persuading employees not to continue their union representation, but the Act protects such campaign-related speech, which is not unlawful merely because some employees might be persuaded by it. See Section 8(c), supra.[28]

[27] See, e.g., *Unifirst Corp.*, 346 NLRB 591, 593 (2006) ("Under extant Board law, employers may make truthful statements to employees concerning benefits available to their represented and unrepresented employees, may compare wages and benefits at their unionized and non-unionized facilities, and may offer an opinion, based on such comparisons, that employees would be better off without a union.") (citing *TCI Cablevision of Washington*, 329 NLRB 700 (1999)); *Suburban Journals of Greater St. Louis*, 343 NLRB 157 (2004); *Viacom Cablevision*, 267 NLRB 1141 (1983).

[28] I find distinguishable the cases relied upon by the majority to support their finding that the Respondent threatened that continued union representation would be futile. In *Aqua Cool*, 332 NLRB 95, 96 (2000), the employer conveyed that unionization would be futile by informing employees that they "were unlikely to win anything more (and possibly less) at the bargaining table than the bulk of the [company's] other employees." The employer also told employees that they "would lose all [their] benefits and [they] would have to start [negotiations] from zero." Id. at 95. Here, unlike in *Aqua Cool*, the Respondent never told employees that the Union was unlikely to win them anything at the bargaining table and never made any bargaining-from-scratch comments. To the contrary, it specifically informed employees that "wages, hours, benefits, and working conditions" could "change favorably or unfavorably," and it assured employees that it "wouldn't reduce wages, benefits, or working conditions just because the union won." In *Smithfield Foods*, 347 NLRB at 1229, the employer's president threatened employees that unionization would be futile by telling them that "this plant will continue to get pay and benefits similar to other plants, *not more, not less*. The [union] will not win a strike

C. Alleged Promulgation of a Rule Requiring Employees to Report Threats and Harassment

Contrary to the majority and the judge, I believe the Board should also dismiss the allegation that the Respondent violated Section 8(a)(1) of the Act when Ledbetter told a large group of employees on January 23, 2013: "If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately . . . ."

The majority finds that when Ledbetter made this statement, he promulgated a rule. Having found that the Respondent promulgated a rule, the majority then applies *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and finds the "rule" unlawful on two grounds: employees would reasonably construe the "rule" to prohibit them from engaging in union activities, and the "rule" was promulgated in response to union activity.[29]

In my view, the primary and most fundamental error in my colleagues' findings is their conclusion that Ledbetter promulgated a "rule" when he advised employees that "we want to know" about any harassment they suffer or threats they receive during the election campaign. Ledbetter did not issue a generally applicable directive or rule, and he did not threaten anyone with discipline if they neglected to report being harassed or threatened. Rather, Ledbetter indicated a desire to know if anyone were threatened or harassed. In other words, no command or prohibition—no *rule*—was issued.

Second, even if *Lutheran Heritage* applies to Ledbetter's statement, I do not believe that employees would "reasonably construe" the statement to prohibit Section 7 activity. Ledbetter asked employees to report if they were "harassed or threatened on any basis," and he made it clear that it did not matter "whether you are for or against the union." The most reasonable interpretation of this statement is that the Respondent was concerned about conduct that was *outside* of Section 7 protection—i.e., harassment or threats—and the Respondent's concern existed even if employees *favored* the union. Such a statement cannot reasonably be regarded as interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.[30] Rather, the statement is most fairly interpreted as an expression of *opposition* to such improper conduct and in *support* of the free exercise of Section 7 rights.

Third, even if Ledbetter's statement could be deemed a rule (which I believe would be unreasonable based on the record before us), I disagree with my colleagues' conclusion that such a rule must be considered unlawful because it was promulgated "in response" to Section 7 activity. The mere fact that a rule is promulgated *after* employees engage in NLRA-protected activity does not necessarily establish that the rule was promulgated "in response" to that activity.[31] Especially considering the substance of Ledbetter's statement—which was merely that the Company "wanted to know" if employees were being harassed or threatened—I believe the record does not support a finding that the statement was in response to Section 7 activity. The more plausible conclusion is that it pertained to potential harassment or threats that would be unprotected by Section 7.

Finally, I disagree with the *Lutheran Heritage* "reasonably construe" standard, for reasons I explained at length in my separate opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part). Thus, even if Ledbetter's statement is regarded as a "rule," I believe it can be deemed unlawful only if justifications for the rule are outweighed by its adverse impact on Section 7 rights.[32] Applying this test, I believe

against Smithfield" (emphasis added). In contrast, the Respondent here made statements conveying that if employees retained the Union, the Respondent would continue to bargain in good faith and that employees' terms and conditions of employment could change favorably as well as unfavorably depending on the outcome of those good-faith negotiations. Finally, in *Ring Can Corp.*, 303 NLRB 353, 353 fn. 2 (1991), the employer stated that a union would be "powerless" to prevent the employer from retaliating against employees by committing certain threatened unfair labor practices if they elected a union (i.e., revoking a recently granted wage increase and reducing insurance benefits). Here, in contrast, and as explained above, the Respondent did not threaten to retaliate against employees if they retained the Union and never claimed that the Union was powerless to prevent the Respondent from committing unfair labor practices.

[29] The judge also found that Ledbetter's statement violated Sec. 8(a)(1) as a "mass questioning about Union activities." Like the majority, I find it unnecessary to address this alleged instance of interrogation because the Respondent separately coercively interrogated employee Contreras about his union sentiments, and any additional 8(a)(1) interrogation findings would be merely cumulative as they would not affect the remedy. See supra fn. 1.

[30] See Sec. 8(a)(1).

[31] See *Tarlton & Son, Inc*., 363 NLRB No. 175, slip op. at 5–6 (2016).) (Member Miscimarra, dissenting).

[32] See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (describing the need to balance the "undisputed right of self-organization assured to employees" and "the equally undisputed right of employers to maintain discipline in their establishments," rights that "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee," because the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society"); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (referring to the Board's "duty to strike the proper bal-

Ledbetter's statement cannot reasonably be deemed unlawful because compelling justifications support inviting employees to notify their employer if any employee is being "harassed or threatened on any basis." Such misconduct could be based in part on sex, race, color, or national origin in violation of Title VII of the Civil Rights Act of 1964, and employers are required to encourage reports of unlawful harassment and to promptly investigate any such reports.[33] Moreover, the Respondent has an interest in learning of alleged harassment or threats so it can investigate, evaluate, and determine whether they call for remedial action or possibly the filing of charges with the Board. In contrast to these justifications, I believe the potential impact of Ledbetter's statement on NLRA rights would be "comparatively slight,"[34] since harassment or threats would likely be unprotected under the NLRA, and Ledbetter merely indicated that Respondent "wanted to know" about any alleged harassment or threats. For these reasons as well, I believe the Board cannot reasonably find that Ledbetter's statement constitutes an unlawful rule that violates Section 8(a)(1) of the Act.

Conclusion

For the above reasons, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. August 4, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline, job loss, closure of the facility, or other unspecified reprisals, if you engage in activities on behalf of the Bakery, Confectionery, Tobacco and Grain Millers Union, Local 111 (the Union) or other protected concerted activities.

WE WILL NOT coercively interrogate you about your union or other protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten you that retaining the Union as your collective-bargaining representative would be futile.

WE WILL NOT promise you improved wages and other unspecified benefits to discourage you from retaining the Union as your collective-bargaining representative.

WE WILL NOT disparage the Union, while appealing to racial prejudice, to discourage you from retaining the Union as your collective-bargaining representative.

WE WILL NOT orally promulgate or maintain an overly broad rule in response to union activity that instructs employees to report harassment and threats on any basis during the election campaign, regardless of whether they were for or against the Union.

WE WILL NOT commence disciplinary investigations against, issue personnel file documentations and written warnings to, and suspend you because of your support for and activities on behalf of the Union.

WE WILL NOT withdraw recognition from the Union and fail and refuse to bargain with it as your exclusive collective-bargaining representative.

WE WILL NOT unilaterally grant a wage increase to you, without providing the Union notice and an opportunity to bargain.

WE WILL NOT unilaterally implement new rules regarding the Union's access to unit employees at the plant or bar the Union from entering the plant, without giving the Union notice and an opportunity to bargain.

WE WILL NOT unilaterally install surveillance cameras in the break area, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaran-

ance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.").

[33] See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

[34] *Great Dane Trailers*, supra, 388 U.S. at 34.

teed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and sanitation employees employed by the Company at its Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective-bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

WE WILL, on request by the Union, rescind the wage increase that was implemented in September 2013, and bargain with the Union before implementing future wage and benefit increases for unit employees, provided, however, that nothing in the Board's Order shall be construed as requiring or authorizing us to cancel any unilateral change that benefited the unit employees unless the Union requests such action.

WE WILL restore the plant access policy, including the windowed wall that divided the break area, which was in effect prior to March 8, 2012.

WE WILL remove the surveillance cameras that were installed in the break area, and bargain with the Union before installing such cameras in the break area in the future.

WE WILL, within 14 days from the date of the Board's Order, rescind, in writing, the orally promulgated and maintained rule that unlawfully instructs employees to report harassment and threats on any basis during the election campaign, regardless of whether they were for or against the Union, and WE WILL, within 3 days thereafter, notify employees in writing that this rule has been rescinded.

WE WILL make Lorraine Marks whole for any loss of earnings and other benefits resulting from her suspension, less any net interim earnings, plus interest.

WE WILL compensate Lorraine Marks for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary investigations of Sandra Phillips, Lorraine Marks, and Vicki Loudermilk, Marks' and Loudermilk's personnel file documentations, Phillips' written warning, and Marks' suspension, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the investigations, personnel file documentations, written warning, and suspension will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by Rickey Ledbetter (or the current executive vice president/general manager), in the presence of a Board agent, or by a Board agent in the presence of that official.

SOUTHERN BAKERIES, LLC

The Board's decision can be found at www.nlrb.gov/case/15-CA-101311 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Linda Mohns, Zachary E. Herlands, and *Caitlin E. Bergo, Esqs.,* for the General Counsel.

David L. Swider and *Sandra Perry, Esqs. (Bose McKinney & Evans LLP*), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. On February 4 through 7, 2014, this case was heard in Hope, Arkansas. The complaint alleged that Southern Bakeries, LLC (the Company or Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1] On the entire record,[2] including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following[3]

[1] The General Counsel withdrew complaint pars. 14 and 17 covering Earnest Beasley's suspension and firing.

[2] Transcript citations relate to the official transcript. The PDF transcript in NxGen, the Agency's electronic case processing system, is paginated differently.

[3] The joint motion to correct the transcript dated March 28, 2014, is granted, and received as Jt. Exh. 55.

FINDINGS OF FACT[4]

I. JURISDICTION

The Company operates a commercial bakery in Hope, Arkansas (the plant), where it annually sells goods valued at more than $50,000 directly to points outside of Arkansas. I find that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. I also find that the Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111 (the Union) is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The plant, a continuous operation, manufactures baked goods. In 2005, the Company purchased the plant from Meyer's Bakeries, Inc. It then recognized the Union as the exclusive collective-bargaining representative of the plant's production and sanitation workers (the unit), and adopted their collective-bargaining agreement. The parties, thereafter, memorialized this relationship in several contracts, with their most recent agreement running from February 8, 2010, to February 8, 2012 (the CBA).[5] (Jt. Exh. 1). There are 200 employees in the unit.

Cesar Calderon, International union representative, serviced the unit.[6] He handled bargaining, grievances and other matters. Alice Briggs, unit employee, is a Shop Steward. Rickey Ledbetter is the Company's executive vice president/general manager, Dan Banks is the director of manufacturing, and Linda Burke was the human resources manager.[7]

B. First Decertification Petition

On December 7, 2011, Nadine Pugh, an employee, filed an RD-Decertification petition (the first decertification petition) with the National Labor Relations Board (the Board), which sought to oust the Union. (R. Exh. 4.) Although the petition was blocked and never resulted in an election, it prompted a flurry of union visits seeking to address the unit's disenchantment. The Company reacted by impeding the Union's access, and a battle ensued over such rights.

C. Plant Access Disputes Following the First Decertification Petition

1. CBA's access provision

Article I of the CBA provides:

> **Section 1.03. Union Representative.** . . . . [T]he Union shall . . . enter the production and sanitation departments [to] . . . see . . . that the Agreement is being observed after giving . . . twelve (12) hours actual notice . . . . The Company . . . may accept a reduced notice period . . . . The Union . . . agrees to limit break room visitation to a Company designated break room area . . . .

(Jt. Exh. 2).

[4] Unless otherwise explained, factual findings arise from admissions, joint exhibits, stipulations, and uncontroverted testimony.

[5] All dates herein are in 2012, unless otherwise stated.

[6] He serviced the unit from 2011 through mid-2013.

[7] Burke has since resigned and is now employed by Tyson Foods, Inc.

2. Union access policy prior to the first decertification petition

Calderon described the Company's union access policy before the first decertification petition. Specifically, he testified that union representatives freely met with the unit in the break area, which was a large rectangular room that was divided by a windowed wall into two smaller rooms.[8] See (Jt. Exh. 44). He added that the Company solely sought advance notice, and never monitored visit subject matter or frequency. Sandra Phillips, a unit bread packer since 1993, stated that the Union previously met with the unit in the break area, without interference.

Ledbetter testified that union representatives were only allowed to visit for grievance-handling. He stated that the CBA supports his position, and that the Company was consistent.

Given that Calderon stated that the Union was previously granted relatively unfettered access to the break area, while Ledbetter testified to the contrary, I must make a credibility determination. I credit Calderon. First, he was a straightforward witness, who answered all queries candidly and thoughtfully. Second, his testimony was corroborated by Phillips, who was also credible and had a strong demeanor. Third, Ledbetter appeared less than candid, sporadically argumentative, and parsed his words when answering tougher queries. Lastly, it is plausible that, when the parties' relationship was less adversarial, the Company took a more liberal stance on Union access.

3. March 8—Ledbetter's Letter to Calderon

On this date, Ledbetter announced to Calderon that:

> Section 1.03 of the CBA limits the purpose for which you can meet at our facility . . . the only reason for such visits . . . is "for the purpose of seeing that the Agreement is being observed." To me, that means you can visit employees at our facility . . . to investigate, resolve, and/or pursue potential violations of the contract . . . . This clearly does not include general visits; visits to drum up support for the Union; . . . or to solicit/discuss ideas for contract negotiation purposes. Typically, these types of meetings are done offsite . . . .
>
> Please narrow your time frame . . . to accomplish the limited appropriate purpose set out in Section 1.03 . . . or, let me know what possible contract violation(s) could consume so much unrestricted time.

(Jt. Exh. 44) (emphasis added).

4. March 12 to 20—Parties' Replies Concerning Access

On March 12, Calderon responded:

> Section 1.03 of the CBA does not specify that the union requires a specified reason to conduct a union visit to your plant . . . .
>
> **In past practice, union officials have had access . . . to conduct union business for both specific reasons and general visitations . . . .**
>
> In addition, this letter will serve to notify management that the

[8] He estimated that the frequency of his annual visits ranged from 2 to 36 visits.

> union will conduct . . . visit[s] . . . March 13th . . . [and] 14th . . . .

(GC Exh. 2) (emphasis added); see also (Jt. Exh. 44). Although Ledbetter initially denied this request, he later granted Calderon limited access on March 20 for grievance-handling. (Id.).

5. March 20—Calderon's Plant Visit and the New Cubicle Policy

Calderon testified that Banks greeted him by announcing that he was no longer permitted to meet employees in the break area, and escorted him to an adjacent vending machine area, where a tiny cubicle had been set up for him.[9] He stated that Banks told him that he needed to identify whom he wanted to see, and that he would then retrieve the workers. He added that he explained that this new arrangement might be intimidating for employees, who often preferred a private audience before deciding whether to file a grievance. He recollected that the cubicle had no table and only a single chair. He added that he was unaware of the Union ever being relegated to a cubicle. He stated that Banks offered that employees had complained about him, as a rationale for his new isolation.[10] He added that he refused to enter the cubicle, and insisted that Banks permit him to meet in the break area, in accordance with past practice. He said that Banks then threatened to call the police, and that he then left the plant after only a short meeting. He related that unit employees were uncomfortable with the new arrangement and did not want to be seen meeting with him, due to the great hostility between the parties. He added that sitting in the break area often generated important impromptu meetings concerning the CBA, and that the cubicle rendered him virtually invisible. He stated that, in the past, he lingered in the break area for several hours at a time. David Woods, International union representative, corroborated his testimony about the cubicle and the past access policy.

Ledbetter admitted the new cubicle policy, and said that his actions were triggered by complaints. He stated that the CBA afforded him the right to relegate the Union to the cubicle.

6. March 23—Company's Ban of Calderon

On this date, Ledbetter banned Calderon from the plant as follows:

> We have received another employee complaint concerning inappropriate conduct by Cesar Calderon during his visits . . . . The complaint is that Cesar has, on more than one occasion, harassed this employee, continues to pressure the employee to support union organization after being told to be left alone; physically and mentally interfered with the employee's meal consumption; sent strangers to the employee's home; and, performed inappropriate touching . . . on March 20 . . . .
>
> We will endeavor to investigate the allegations of harassment . . . . In the meantime, we cannot allow Cesar Calderon to access our property . . . .

(Jt. Exh. 44.) The Company, as noted, conspicuously failed to present any harassed workers or offer incident reports. As explained, I credit Calderon's denial and find that the ban was part of a systematic attempt to impede the Union's access before the decertification vote and that the harassment allegations were a hoax. The Company later reinstated Calderon's access rights, as part of an informal Board settlement agreement covering this matter and others.[11] (Jt. Exh. 4.)

D. Second Decertification Petition

On May 23, John Hankins, a unit employee, filed another RD-Decertification petition (the second decertification petition) with the Board seeking to oust the Union. (Jt. Exh. 45.) This petition was blocked by further unfair labor practice charges and an election was never held.

E. Plant Access Disputes Following the Second Decertification Petition

1. January 7, 2013—Ledbetter's letter to the Union

In response to the Union's access request, Ledbetter replied:

> Consistent with . . . our expired agreement and its established practice, . . . the visit may only be "for the purpose of seeing that the Agreement is being observed." . . . . These limitations will not permit your representatives to hold general solicitation or election propaganda meetings . . . . If we learn that this is the purpose . . . , we will not . . . allow your presence on our premises. . . .
>
> [Y]our visits will be confined to the reserved small employee break room and you will not be permitted to . . . disturb . . . employees in the large break room . . . .

(JT. Exh. 44.)

2. January 8, 2013—Surveillance Cameras and Break Area Windows

Calderon, Woods and Fields, met with Ledbetter, Banks and Burke at the plant. Calderon recalled Ledbetter affirming that the Union could only visit for grievances. Woods corroborated his testimony, and added that the Union also observed that surveillance cameras had been placed in the break area.[12] It is undisputed that these cameras were installed without notice or

[9] The cubicle was approximately 5 by 4 feet.

[10] He said that he later learned that he had been accused of improperly hugging Juan Rivera, which he denied. It is noteworthy that Rivera never testified about this matter. For several reasons, I fully credit Calderon's denial regarding Rivera, and find the Company's accusation was a hoax. First, the Company failed to adduce testimony from Rivera or any other employee, who was harassed by Calderon. Second, the Company failed to provide any written documentation or reports, which demonstrated such harassment. Third, as noted, Calderon was a highly believable witness, with a stellar demeanor. Finally, I find it likely that the Company created a hoax about Calderon, as part of its multi-pronged strategy to oust the Union.

[11] The Settlement Agreement stated that, "[b]y entering into this [resolution] . . . , the Charged Party does not admit that it has violated the National Labor Relations Act." (Jt. Exh. 4). This settlement was later rescinded by the Board due to the Company's ongoing violations of the Act. (GC Exh. 1(kk)).

[12] Although surveillance cameras have historically monitored production areas, see (R. Exhs. 8–9), the parties stipulated that such cameras were first installed in the break area in November 2012. See (Jt. Exhs. 1 and 6.)

bargaining.[13] He added that he also learned that the windowed wall that divided the break area had been dismantled, and replaced with plywood.

Ledbetter explained that the cameras were installed to deter theft and averred that he was unobligated to bargain. He said that he offered to cover the cameras, whenever the Union visited.[14] See (GC Exh. 9). Regarding the break area windows, he alleged that, in January 2013, the break area air conditioning system failed, which required the Company to temporarily remove the windows for ventilation purposes. He stated that, once the air conditioning was repaired, he installed a plywood wall because food safety regulations required him to replace transparent windows with opaque materials. Banks corroborated this point. But see (GC Exh. 16) (Respondent counsel's position letter, which mentions "food safety," but, conspicuously fails to discuss a broken air conditioning system). It is equally noteworthy that Respondent failed to produce a work order or documents corroborating a broken air conditioning system. It is similarly striking that Respondent failed to cite the relevant food safety regulations that prohibited reinstalling non-breakable windows in the break area.

For several reasons, I do not credit Ledbetter's contention that he removed the break area windows because the air conditioning system failed and was prevented from reinstalling unbreakable windows by food safety regulations. First, his demeanor was less than credible. Second, his air conditioning testimony was contradicted by counsel's position letter, which conspicuously failed to cite a broken air conditioning system. Third, if the air conditioner had actually broken, counsel would have corroborated this point with a work order or other documentation. Finally, the Company failed to cite the supporting food safety regulations.

3. January 16, 2013—Ledbetter's Letter

On this date, Ledbetter informed the Union that:

> [W]e now have it . . . that the reason for this sudden onslaught of visits has been to "campaign" and solicit support for the upcoming decertification election. That is . . . not consistent with . . . our expired contract . . . or our past practice . . . .
>
> Accordingly, we can no longer permit you to access our premises without knowing . . . the particular issue . . . you wish to investigate. We will also need to know with whom you would like to meet . . . . If we become aware of continued deviation . . . , we will have no choice but to prohibit your . . . visits . . . .

(Jt. Exh. 44.) The Company, thereafter, banned visits whenever Briggs, the Union Steward, was not scheduled to work.

4. January 21 and 22, 2013—Ledbetter's letters

In reply to Calderon's access request, on January 21, 2013, Ledbetter replied that:

> The terms of our approved visits remain the same . . . .
>
> [W]e require an explanation of the . . . . the issue(s) . . . you wish to investigate. We also need to know who(m) you would like to meet . . . .
>
> I will [then] let you know if the request . . . is approved . . . .

(JT. Exh. 44).

In response to Calderon's reminder that the Union was, inter alia, investigating certain grievances, by letter dated January 22, 2013, Ledbetter replied as follows:

> [Y]our misguided belief . . . that the union does not need our permission to visit is simply untrue. . . . If a representative enters the property after the request is denied then it is trespassing on private property and subject to arrest . . . .
>
> If your next scheduled visit is to adjust grievances, as you have represented, the visit is granted. On the other hand, if the visit is to electioneer, solicit union support, or for any other reason . . . your request to visit is denied . . . .

(Id.).

5. February 2013—Ongoing Access Issues

On February 7, 2013, Calderon informed Ledbetter that, "the union will be visiting the plant . . . February 8 [at various times] . . . ." (Jt. Exh. 44.) This request was denied. (Id.).

6. April 17, 2013—Ledbetter's Letter

On April 17, 2013, Calderon sought to visit on April 22. (Jt. Exh. 47.) Ledbetter denied his request. (Id.). Calderon reported that, since that time, he has been barred from the plant.[15]

F. January 17, 2013—Posting

On this date, the Company posted a memo, which it labeled as "Answers to Employee Questions Dated January 16, 2013," and stated as follows:

> The union . . . . [has] plans to take our employees out on strike . . . same as they . . . did at Hostess, where over 18,000 jobs were lost and 33 bakeries . . . closed.

(Jt. Exh. 45.) This memo attributed several inaccurate statements to the Union, including a racially divisive accusation that the Union said that the Company would, "fire Hispanics" after the election. (Id.) The Company failed to offer any proof that the underlying employee questions, or inaccurate union campaign statements, were genuine.

G. Captive Audience Meetings

In January and February 2013, Ledbetter delivered several captive audience speeches. These speeches were presented in English, and translated into Spanish.

1. January 23, 2013 speeches

Ledbetter delivered "kick-off" and "collective-bargaining" talks. (Jt. Exh. 13.) Roughly 170 unit employees attended.

[13] Regarding the cameras, the Employee Handbook states that, "Southern reserves the right to use surveillance . . . equipment . . . . for the general protection of the workforce and for the good of the Company." (Jt. Exh. 3.)

[14] Robby Turner, info. technologist, said that the cameras do not pan or record audio. (Jt. Exh. 8; R. Exhs. 6–7.)

[15] He left his union position in August 2013, and commenced employment with a different labor organization.

a. "Kick-off" speech

This segment provided, inter alia, as follows:

> From an economic standpoint, we do not want a union here because . . . it drags our Company down . . . . If we can't beat our competition, we can't survive. Just look at what happened to the Hostess Bakeries, Automobile companies and Steel companies. Unions strangled these companies to death . . . .
>
> There are lots of things a union can do to hurt . . . . Higher costs, less flexibility, lower productivity, and loss of team unity can be crippling . . . and cost employees their jobs . . . .
>
> Just look at what happened to Meyer's Bakeries and . . . at Hostess. At Hostess, a union strike by [this Union] . . . resulted in the loss of over 18K jobs, the liquidation of 33 bakeries . . . . That is one of the reasons why we do not want a union here. Also, all of our costs related to dealing with this union leave less money for wages and benefits . . . .
>
> [The Union] could only hurt our chance of long-term success and security . . . .
>
> If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately so we can address the problem . . . .
>
> [T]o remedy the problem . . . , you must bring it to our attention . . . .

(Jt. Exh. 7) (emphasis omitted).

b. "Collective-bargaining" Speech

This segment provided, inter alia, as follows:

> [U]nions are free to promise . . . . they can promise . . . the moon . . . . [T]he union has no power to make its promises come true . . . .
>
> [D]uring collective bargaining , all the union can do is ask and all the union can get is what the Company will agree to give . . . .
>
> [T]he union is free to make any promises . . . . but . . .could not guarantee anything . . . . Because of the rules surrounding collective bargaining, you could have ended up with less than the non-union employees here at Southern Bakeries, which has turned out to be the case . . . .
>
> Don't be a victim of . . . slick salespeople . . . . The union can only promise . . . .
>
> Why is it that collective bargaining . . . result[ed] in your getting less pay than non-union employees?[16] . . . .
>
> [O]ur bottom line is thin . . . , the money . . . spent . . . dealing with the union is money that is simply not otherwise available . . . . [W]e have to hire expensive lawyers to help us . . . [with the] union. Not including the administrative time and other expenses we have had to spend . . . , which takes time away from our efforts to maintain customers and grow . . . , we have incurred tens of thousands of dollars in legal fees that have left us with less money . . . [for] our unionized employees than we have been able to give to our non-union workforce . . . .
>
> Remember what happened to all of the Hostess employees—2/3 were not part of BCTGM but also lost their jobs along with the striking BCTGM union-covered employees. Over 18,000.

(Jt. Exh. 8) (emphasis omitted).

2. February 1, 2013 speeches

Ledbetter delivered "collective-bargaining," "strikes," and "job security" presentations.[17] (Jt. Exh. 14.) Approximately 170 unit employees attended.

a . "Strikes" speech

This segment provided, inter alia, as follows:

> [A]ll a union can do is ask, and . . . get . . . what a company . . . agrees to . . . .
>
> [T]he union has stated that it plans to deal with Southern Bakeries in the same way as Hostess with a strike and/or boycotts, by trying to get customers to stop buying our products if we don't agree to union demands. If that is the case, this is of great concern because, as you know, the BCTGM strike closed Hostess . . . .
>
> [S]ee if the Union will sign a warranty coupon when it promises you something. Otherwise you have no guarantee . . . only a worthless promise . . . .
>
> [S]trikes hold a real threat of backfiring. And, when they backfire, employees and their families . . . get hurt. Hostess's closure is a good example . . . .
>
> [T]he BCTGM is union that likes to strike . . . the BCTGM has been responsible for at least 42 strikes since the beginning of 2000 . . . .
>
> [E]conomic strikers . . . can also be permanently replaced. During a strike, a company has the right to continue operating . . . . It can . . . be done with employees of other companies through subcontracting. When that happens, jobs are often lost at the striking facility . . . .
>
> Unions sometimes force employees to get involved in union boycotts of our customers . . . . This can be devastating . . . this makes it harder for the company to survive and can obviously lead to less jobs. . . .
>
> The bottom line is that rather than increasing . . . , job security can be seriously threatened by a union.
>
> If a strike does succeed in crippling a company, the company might not have the ability to satisfy its customers' demands . . . . This is how the BCTGM strike closed down the Hostess Company. Over 18,000 jobs. . . .

[16] This query was repeated 10 times. (Jt. Exh. 8.)

[17] The "collective-bargaining" segment was a redux of the January 23, 2013 speech.

> Can the union help . . . ? Would strikes, boycotts, permanent replacements, labor/management discord, and loss of profitability help . . . ?

(Jt. Exh. 9) (emphasis omitted).

b. "Job Security" speech

This segment provided, inter alia, as follows:

> There are many ways that a union can threaten job security . . . .
>
> Just because the contract is for a certain period . . . doesn't meant that the company has to stay open . . . .
>
> Just remember what happened to Meyer's Bakeries. They had a union contract but went bankrupt and out of business.
>
> If business conditions require, the company can . . . close its doors tomorrow. . . .
>
> It doesn't do you any good to make $20 per hour under your union contract if you don't have a job . . . .
>
> The union was willing to put your jobs on the line . . . . They appear ready to . . . put your jobs at risk if they continue to represent you after the Election. Specifically, we are hearing . . . that the union is planning to repeat boycotts of our customers
> . . . on your behalf. . . .
>
> [V]ote NO and stop any risk of lost jobs . . . .
>
> It makes sense that the more money a company spends on a union, the less money it has to provide safe, steady and secure good-paying jobs for its employees . . . .
>
> Do you trust BCTGM, who did nothing to prevent Meyers and Hostess and several other companies from going out of business . . . ? . . . .
>
> [V]ote "NO" to the . . . possible loss of job security.

(JT Exh. 10) (emphasis omitted).

3. February 5, 2013 speech

Roughly 150 unit employees attended Ledbetter's "final speech," which provided:

> We encourage you to vote "NO".
>
> We have learned that collective bargaining only gives the union the right to ask the company for . . . what the union wants. . . .
>
> All a union can do is ask and all a union can get is what a company can voluntarily agree to give. . . .
>
> [W]hen you understand the limits of collective bargaining, you begin to realize how a union is powerless . . . .
>
> I continue to be concerned that the money spent dealing with the union . . . means less money that is available for wage and benefit increases. . . .
>
> You're voting on whether you want to pay this union to put all of your wages [and] benefits . . . on the bargaining table again and risk them in a game of high stakes poker . . . .
>
> The recent Hostess strike by BCTGM . . . put over 18k people out of work. . . .
>
> A company may legally transfer work and jobs to another facility or subcontract the work. Those types of decisions can be permanent. . . .
>
> Employees . . . may lose work and job security. . . .
>
> [T]his company fought this union so hard because we believe that we would all be much better off without it . . . .
>
> [I]ncreased costs . . . may affect our job security . . . .
>
> Unfortunately, unions too often bring high costs and inflexibility to a competitive workplace environment. Time spent . . . bargaining and . . . in . . . resolving grievances is non-revenue generating unproductive time . . . .
>
> [J]ob security is really the basic issue you will be voting on . . . .
>
> You know that job security does not come from a union . . . .
>
> [A] union can often take away a company's ability to survive . . . .
>
> [Y]our choice should be an easy one. VOTE NO! . . . .
>
> As we are getting our head above water, the Harlans have shared this success with us as employees. We have received each year since our beginning in 2005, wage increases and annual cash bonuses and continued competitive benefits.
>
> Exceptions: As a result of collective bargaining . . . Production and Sanitation employees did not receive a wage increase in 2008, 2009 and 2012.
>
> Shipping, Receiving, Maintenance and Driver employees (not represented by a union) received pay increases every year . . . .
>
> The union . . . can show you only a history of plant closings, boycotts, strikes, union dues and broken promises . . . .

(Jt. Exh. 12) (emphasis omitted); see also (Jt. Exh. 15).

H. Disciplinary Actions

1. Sandra Phillips' written warning and related investigation

a. General Counsel's Position

Phillips testified that, on January 31, 2013, she and coworker, David Capetillo, Jr., discussed the Company's repeated accusation that the Union caused Hostess' closure. She said that Capetillo blamed the Union, while she blamed poor management. She stated that she is an open Union supporter.[18] She added that a few days later, she found an article, which supported her position, and shared it with Capetillo on the plant floor. She stated that he did not appear upset and their exchange lasted a couple of minutes. See (Jt. Exh. 29). She related that Capetillo later complained to management, a.nd she was summoned to a meeting with Burke. On March 27, 2013, *i.e., 2 months later*, she received this written warning:

[18] Calderon credibly testified that Phillips, a vocal union supporter, handled grievances and related duties.

> [Y]ou admitted approaching Capetillo at his work station during . . . paid work time, removing a newspaper article . . . [and] ask[ing him] to read the article . . . .
>
> This behavior is a direct violation of Group B Rule 8:
>
> Group B Rule 8: Bringing newspaper . . . into a production or distribution area.
>
> Management respects each individual's right to their opinion . . . however, behavior which may create an unpleasant, threatening or hostile work environment must not be allowed. Demonstrating such acts during the paid working time of either employee is also a violation of Company Rules . . . .
>
> Following the Group B step process you will receive disciplinary action in the form of a 1st Written Warning for violation of Group B Rule 8. . . .
>
> You are also warned to refrain from . . . harassment of fellow employees . . . .

(Jt. Exh. 32.)[19] Phillips stated that the warning was befuddling, given that Pugh openly disseminated the first decertification petition in production areas, without reprisal. She added that coworkers commonly brought newspapers onto the plant floor, without discipline.

b. Company's Position

Ledbetter testified that Phillips jeopardized food safety, and that the prohibition against bringing newspapers onto the plant floor was designed to prevent food contamination. He stated that an auditor could have shut the plant down, on the basis of Phillips' actions.

2. Vicki Loudermilk's and Lorraine Marks' investigations and personnel file documentations

The Company also investigated Vicki Loudermilk, whom Capetillo accused of, "asking him how [he] . . . was going to vote," and Lorraine Marks, whom he accused of saying that he would lose his job, if the Union were ousted and asking about his vote. (Jt. Exh. 28). Marks was summoned to Burke's office, and denied these accusations. (Jt. Exh. 30). Loudermilk, who was also summoned to Burke's office, claimed that Capetillo openly volunteered how he intended to vote. (Jt. Exh. 31).

On March 27, 2013, the Company issued Personnel File Documentations to Marks and Loudermilk. (Jt. Exhs. 34–35). It told Marks that, although it could not resolve the credibility dispute, it would place its investigation report in her personnel file. (Jt. Exh. 34). It told Loudermilk that, while she violated workplace rules by interfering with a coworker, it would limit its response to placing its investigation report in her personnel file. (Jt. Exh. 35).

3. Marks' suspension

a. General Counsel's position

Marks testified that she regularly met with union representatives at the plant, attended union meetings and filed grievances.[20] (GC Exh. 5.) She stated that, on May 24, 2013, she had an unexpected and dire need for a restroom break, but, could not find a supervisor or team leader to notify. She added her regularly assigned team leader was on leave, and that the replacement team leader was on a break, when her emergency arose. She stated that, consequently, she left the production line for a short period without advising supervision. She stated that she told Phillips, her coworker, before she left, who covered her 5-minute absence. She added that she has previously taken the same actions under comparable circumstances, without issue. She related that, upon her return, she encountered Banks, who inquired about her whereabouts. She averred that she was then summoned to Burke's office, who issued her a suspension pending investigation for leaving her work area, without permission.[21] (Jt. Exh. 48). She indicated that she has subsequently seen others taking comparable breaks, without issue.

Phillips stated that Marks was absent for less than 5 minutes, after first unsuccessfully searching for supervision. She stated that she filled in for her and production was unharmed. She stated that coworkers regularly left the line to use the restroom, without issue. She estimated that she personally covered for such coworkers at least once per month. She added that, while supervisors were generally available, there were substantial periods when they were not.[22]

Briggs, another unit employee, testified that she told Banks that she "saw three people walking . . . to the bathroom without permission" and that he coyly replied that, "they weren't investigating them."[23] (Tr. 422.) She stated that Marks was treated unfairly.

Calderon testified that Marks was an active union member, who pursued a key grievance involving temporary workers in 2012, which resulted in 15 workers receiving backpay. He stated that she campaigned for the Union, which included distributing literature and telephoning employees. He noted that she encouraged new employees to become union members. He said that her suspension was the first discipline of its kind involving a bathroom break.

b. Final written warning and suspension

On May 30, 2013, Marks received the following Final Written Warning:

> You were suspended May 24, 2013 pending investigation of Immediate Termination Rules, Group A Rule(s) 3 and 22.
>
> Rule 3: Using Company time. . . for personal use unrelated to employment . . . without proper authorization. *This includes leaving Company property during paid breaks or leaving your assigned work area without permission*.
>
> Rule 22: Job abandonment, including . . . leaving an assigned

[19] The Facility Rules provide a written warning for a first infraction of a Group B Rule. (Jt. Exhs. 32–33.)

[20] She stated that, about 3 years earlier, she picketed on behalf of the Union concerning contract negotiations.

[21] She was then suspended from work without pay from March 24 through 31.

[22] She estimated that a supervisor was available for coverage about 90 percent of the time.

[23] She stated that she was later asked to reveal these employees to Burke, and refused.

work area without permission—i.e. walking off the job.

Conclusion:

During our investigation you indicated that you did not obtain permission to leave your work area . . . . .

- Department Supervisor Ray Golston informed me that he was in the department . . . .
- On your way to the restroom you walked past [Dan Banks] . . . .

Management has considered all mitigating circumstances concluding that discharge is appropriate, but recognizes your long term service. You may return to work without back pay . . . subject to a Final Written Warning.

(Jt. Exh. 49.)

c. Company's position

Ledbetter testified that, although abandoning the production line is a terminable offense, Marks' lengthy service record warranted lesser discipline. He explained that the bakery is a continuous operation, and that her actions could have interrupted operations. He stated that her actions violated work rules and that she had been given notice of such rules.[24] He indicated that the Company has a paging system and it is unacceptable to solely seek a coworker's coverage. He related that Marks was placed on suspension pending investigation and allowed to return to work after 6 days without pay. He denied that others left the line without consent.

Banks testified that Marks works on a fast-paced line. He stated that unscheduled breaks must be reported, and employees can always page supervision on the intercom. He stated that, on May 24, Marks walked right by him, without speaking to him about her issue. Golston, Marks' supervisor, testified that he was only 20 feet from her and that she could have sought his aid. He agreed that she previously sought, and received, permission to leave for restroom breaks.

d. Credibility resolutions

Although it is undisputed that Marks had substantial and open union activity, left the line for less than 5 minutes for an emergency break, her absence was covered by Phillips, production was unaffected, she previously asked for and received restroom breaks and that the normal team leader was absent, there is a credibility dispute over whether supervisor Golston was present. I credit Marks' testimony on this point. First, she was a very believable witness with a solid demeanor. She had a good recollection and was unflustered by the courtroom. Second, her testimony was corroborated by Phillips and Briggs, who stated that Golston was not present. Lastly, it is implausible that Marks, who has previously asked Golston for permission to take restroom breaks, would have neglected to ask him for permission on this occasion, if he were actually there.

I also credit Marks', Phillips', and Briggs' claims that bathroom breaks are commonplace and accepted. I credit them for the reasons previously discussed, but, also on the basis of the Company's conspicuous failure to show that anyone else has been disciplined for this type of offense. It is also plausible that, if the Company policed this work rule as diligently as suggested, it would possess several similar disciplinary records.

e. Other Discipline for Leaving the Production Line

The General Counsel provided some disciplinary records involving employees leaving the production line for extended periods, which demonstrate the Company meting out far less severe discipline under vastly more egregious circumstances. The following chart is illustrative:

Date	Employee	Summary
10/17/12	C. Booker	Without permission, he went home mid-shift. He returned in 2 days, said that he was frustrated and was reinstated under a last chance agreement, without loss of pay.
3/17/12	Brandon Moses	Without permission, he left the production area for a reported restroom break and went home. He was reinstated , with only a final written warning.

(GC Exhs. 11–12.)

4. Christopher Contreras' interview and termination

a. January interview

Contreras, a unit worker, was interviewed by Burke and Banks. He recalled Burke stating that:

> There was a Union . . . and that if anybody tries to ask you to talk about the Union, then just ignore it . . . because they're . . . trying to get rid of the Union . . . if you want to get paid more . . . then ignore everybody who's in the Union.

(Tr. 437.) Both Banks and Burke denied this exchange.

I credit Contreras; he was credible, possessed a straightforward demeanor and had a strong recall. Also, this commentary was consistent with the Company's antiunion campaign.

b. Tenure

I. GENERAL COUNSEL'S POSITION

Contreras began on January 26. He was supervised by Kenny White, who initially granted him leave to see his probationary officer,[25] but, then rejected his later requests in November and December. He stated that he joined the Union in late-August.[26] See (GC Exh. 8). He said that, in November, he observed Hankins and supervisor White walking around the plant and soliciting employees to sign a petition seeking to oust the Union. He said that they told him to sign the petition, if he wanted more money. (Tr. 449.) He added that White told him

[24] See (Jt. Exh. 5 ("Employees must not . . . be out of their assigned work area without permission . . . . Doing so is a Group A violation . . . . . ")); (Jt. Exh. 16)("[When an] urgent . . . situation occurs, and you need to leave your assigned job . . . between scheduled breaks . . . . [,] quickly locate your supervisor . . . for permission. . . . Walking off the job without permission is a Group A rule violation which results in immediate discharge.")).

[25] He was convicted of theft and receiving stolen property.

[26] Calderon testified that he attended union meetings.

that, "if they did not get the Union out, then this facility would go down like Hostess." (Tr. 450.) He said that he declined, and that 2 weeks later White asked why he wanted to pay $40 per month in union dues and prompt a plant closure. He said that White later told him that he had the upper hand and could remove him if desired, which he linked to his union support. He related that he was fired on April 16, 2013. He explained that a warrant had been issued for his arrest because he missed multiple probation meetings. He said that he was stopped for an unrelated matter, arrested for probation revocation, and held for 3 days. He contended that the jail telephone did not permit him to dial extension numbers, which precluded him from notifying the Company. He stated that he later met Burke, who told him that he had been fired for a "no call, no show" violation and nothing could be done. See (Jt. Exh. 41).

II. COMPANY'S POSITION

Contreras was granted 7 excused absences between April 2012 and February 2013. (R. Exh. 3.) Not including the absence that led to his firing, he sustained four additional unexcused absences, and received a second written warning and a 1-day suspension for these transgressions. (R. Exh. 3; Jt. Exhs. 38–40.) In total, he was absent a 12 times during his roughly 1 year tenure.

Ledbetter testified that regular attendance is mandatory and Contreras' firing was warranted. The Company's rules expressly provide that incarceration is not a valid excuse for an absence. He stated that "no-call, no-show" employees are generally fired. He stated that Contreras' union activities were unknown, and played no role in his removal. The Company's personnel records demonstrated that it routinely fired employees for "no-call, no-show" offenses, and other attendance problems. See (R. Exhs. 10–11).

Banks testified that Contreras was fired for missing work without notice. He added that he reached the maximum allowable points under the attendance system and could have also been fired on that basis. He indicated that absences connected to incarceration are unexcused.

White testified that absentees must call in an hour before their scheduled start time. He agreed that Contreras requested leave to visit his probation officer, and that he approved some requests. He indicated that Contreras had repeated attendance issues. He denied knowing about his union activities, or making the antiunion comments.

III. CREDIBILITY RESOLUTION

Although Contreras did not dispute his attendance record or that he was "no-call, no-show," there was a credibility dispute over White's plant closure comments and threats. I credit Contreras. First, as noted, he was a generally credible witness, who was candid about sensitive issues, including his poor attendance and criminal record. Second, I found White to be a less than credible witness, who seemed more committed to pleasing supervision than offering a candid account. Finally, I note that White's plant closure and other threats were highly consistent with the Company's election mantra and that he was likely repeating this theme.

I. APRIL 2013 INTERVIEW COMMENTS

Jeremy Woods, who was employed from about April to July 2013 as a muffin mixer, testified that he was interviewed by Burke and Banks. He recalled them stating that there was an impending union decertification vote, and that, "they could offer him better wages than the Union could and . . . the Union was responsible for shutting down Hostess Bakeries." (Tr. 215.)

Banks denied such commentary, but, did not have any specific recollection of the interview. Burke similarly denied these comments.

I credit Woods. He had a strong recollection. Burke and Banks, on the other hand, had a poor recall of the meeting, and their comments were deeply consistent with the Company's antiunion mantra.

J. Withdrawal of Union Recognition

On June 13, 2013,[27] Hankins submitted a petition to the Company (the third decertification petition), which was signed by a majority of unit employees,[28] and stated:

> PETITION TO REMOVE UNION AS REPRESENTATIVE
>
> The undersigned employees of Southern Bakeries do not want to be represented by Bakery, Confectionary, Tobacco Workers and Grain Millers ("BCTGM") union. We hereby request that our employer immediately withdraw recognition from the BCTGM union, as it does not enjoy the support of a majority of employees in the bargaining unit.

(Jt. Exh. 46.) Burke stated that she verified the authenticity of the signatures.

Hankins, a production coordinator/scheduler,[29] testified that he has been employed for 3 years. He claimed that he became disenchanted with the Union because the unit had not received a raise for several years. He stated that, after the earlier decertification drives failed, he prepared the third decertification petition, after consulting with the National Right to Work Foundation. He stated that he received no aid from management in its dissemination. He denied promising anything, in exchange for signatures. Israel Amidares helped him disseminate the petition amongst Spanish-speaking workers.

K. July 3, 2013—Withdrawal of Recognition

On this date, Ledbetter sent the following letter to the Union:

> On Friday, June 14, 2013; we received a petition filed by the vast majority of our bargaining unit employees requesting that we withdraw recognition of the BGTGM union . . . . We . . . have no reason to believe that any of the signatures are not legitimate.

[27] The third decertification petition was signed between May 31 and June 12, 2013.

[28] Approximately 2/3 of the unit signed the third petition. See (Jt. Exh. 46; R. Exh. 13; tr. 575).

[29] Lewis testified that this position is not in the unit, although there is no evidence that it is supervisory. Lewis was, however, uncertain if the position was newly created, or akin to a unit team leader. Ledbetter stated that Hankins was, at all times, a unit team leader, who was mistaken about his exact job title.

> Accordingly, . . . we hereby withdraw recognition of your union . . . .

(Jt. Exh. 51.) The Company subsequently ceased deducting and remitting union dues.

L. July 22, 2013—Union Rejects Withdrawal of Recognition

On this date, the Union rejected the withdrawal of recognition and requested plant access. (Jt. Exh. 53.) The Company denied their access request. (Jt. Exh. 54.)

M. September 29, 2013—Unilateral Wage Increase

On this date, the Company unilaterally increased the unit's wages by an average of 27 cents per hour. (Jt. Exh. 1.) The increase was implemented without notice or bargaining. (Id.)

III ANALYSIS

A. The 8(a)(1) Allegations

The General Counsel, in some cases, has alleged cumulative 8(a)(1) violations of the same strain (e.g. multiple plant closure threats). In such cases, where merit was found and the remedy was unaltered by finding cumulative violations, only a few illustrative examples were analyzed. See, e.g., *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228–1229 (2006).

1. Interrogations[30]

The Company violated Section 8(a)(1), when it interrogated employees about their union activities. Two examples are demonstrative: in September, White asked Contreras why he became a dues-paying union member; and on January 23, 2013, Ledbetter told employees that: "If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately . . . ."

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss' office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at page 940.

White's comments were an unlawful interrogation; he was Contreras' direct supervisor, he plainly sought information about his union activities, and this interrogation was, as will be discussed, accompanied by an unlawful plant closure threat. Ledbetter's commentary was another interrogation. He is the Company's highest ranking plant official and his comments equated to a mass questioning about union activities, with a charge to report such interactions. His comments were also, as will be discussed, accompanied by other unlawful statements.

2. Discharge and job loss threats[31]

The Company violated Section 8(a)(1), when it repeatedly threatened job loss. Two examples are demonstrative: in September, White, concerning Contreras' refusal to sign a decertification petition, told him that he had the "upper hand" and could get rid of him whenever desired; and on February 1, 2013, Ledbetter repeatedly told employees that unionization would lead to strikes, which could backfire, and damage families and job security.

A statement is an unlawful threat, when it coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a). In evaluating such statements, the Board:

> [D]oes not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.

Sage Dining Service, 312 NLRB 845, 846 (1993); *Double D Construction Group,* 339 NLRB 303 (2003) ("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

Both Ledbetter's and White's comments threatened job loss, and, as a result, reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act. Moreover, the Company failed to demonstrate that Ledbetter's job loss predictions were reasonably based upon objective facts.

2. Plant closure threats[32]

The Company repeatedly threatened plant closure. Ledbetter continuously told employees at captive audience meetings, that retaining the Union would threaten job security, prompt a closure and cripple the business. He added that the Union would kill the Company, in the same way that it toppled Meyers Bakeries and Hostess. White told Contreras that the Union would cause a Hostess-like closure. An employer violates Section 8(a)(1), when it engages in conduct that might reasonably tend to interfere with employees' Section 7 rights, which includes plant closure threats, in retaliation for engaging in union activity. *Mid-South Drywall Co., Inc.*, 339 NLRB 480 (2003). Unsubstantiated predictions that a plant shutdown will result from

[30] These allegations are listed under pars. 6(a), 9 (f), 10(a), 11(f) and (h), 12 and 39 of the complaint.

[31] These allegations are listed under pars. 6(b), 9(a), 11(a) and 39 of the complaint.

[32] These allegations are listed under pars. 8(a), 9(b), 10(b), 11(b), 13(b) and 39 of the complaint.

a union victory are unlawfully coercive. *Federated Logistics & Operations.*, 340 NLRB 255, 256 (2003), petition for review denied 400 F.3d 920 (D.C. Cir 2005).[33] The above-described comments were, accordingly, unlawful.

4. Surveillance[34]

The General Counsel failed to show that the Company engaged in surveillance at the January 23 and February 1, 2013 meetings, as alleged in the complaint. The General Counsel failed to adduce evidence of surveillance, brief the matter, or explain its theory. These allegations are, thus, dismissed.

5. Impression of surveillance[35]

The Company created an unlawful impression on surveillance, when it installed cameras in the break area. An employer creates an unlawful impression of surveillance, if reasonable employees would assume that their union activities are being monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009). Given that the break area was the hub, where union agents conducted their business, the installation of cameras during a decertification campaign reasonably caused employees to assume that their union discussions and activities in this hub were being monitored.

6. Futility of bargaining and unionizing[36]

The Company violated Section 8(a)(1), when Ledbetter repeatedly conveyed that unionization was futile. Specifically, he repeated, at captive-audience meetings, that "unions are free to promise away"; "they can promise employees the moon"; "the union has no power to make its promises come true"; "all the union can do is ask and all the union can get is what the Company will agree to give"; "the union is free to make any promises . . . . but . . . could not guarantee anything"; "don't be a victim of believing slick salespeople"; and "collective bargaining can, and did, result in your getting less pay than non-union employees."

The Board has held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See, e.g., *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832 (1994). Statements made in a coercive context are unlawful because they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.,* 336 NLRB 1119, 1119–1120 (2001), enfd. sub nom. *Sara lee Bakery Group, Inc. v. NLRB*, 61 Fed.Appx. 1 (4th Cir. 2003); see, e.g., *Smithfield Foods,* 347 NLRB 1225, 1230 (2006) (statement from highest official that company was in complete control of future negotiations was unlawful), petition for review denied sub nom. *Food & Commercial Workers Local 204 v. NLRB*, 506 F.3d 1078 (D.C. 2007)); *Aqua Cool*, 332 NLRB 95, 95 (2000) (statement that employees were unlikely to win anything more at the bargaining table than other employees). Ledbetter's comments unlawfully conveyed that ongoing unionization was futile.

7. Promising benefits[37]

The Company violated Section 8(a)(1), when it continuously promised to reward employees with higher wages, if they rejected the Union. Ledbetter repeatedly advised the unit that their non-Union colleagues were paid more and received wage increases while theirs stagnated, and identified the Union as the cause. Specifically, in early 2013, he made these statements: "[a]ll of our costs related to dealing with this union leave less money for wages and benefits"; "[w]hy is it that collective bargaining can, and did, result in your getting less pay than non-union employees?"; "[m]oney . . . spent on bargaining and grievances and otherwise dealing with the union is money that is simply not otherwise available to our employees"; and "we have incurred tens of thousands of dollars in legal fees that have left us with less money to put into the pockets of our unionized employees than we have been able to give to our non-union workforce." (Jt. Exhs. 7–8). Banks and Burke mimicked this theme, when they told Woods that a Union decertification vote was approaching and "they could offer . . . better wages than the Union."

An employer violates the Act, when it promises to reward employees, in order to curtail unionization. See *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003), enfd.in relevant part 397F.3d 548 (7th Cir. 2005). The danger inherent in a well-timed promise to bestow a benefit is the implication that employees must disavow their union support, in order to obtain the benefit. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The obvious message behind the above-described unlawful statements was that, if unit employees wanted a raise, they first needed to jettison the Union.

8. Threats of Unspecified Reprisals[38]

The Company violated Section 8(a)(1), when it threatened employees with unspecified reprisals. Ledbetter made this statement in January 2013:

> If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately so we can address the problem . . . .

(Jt. Exh. 7.) The Board has held that such invitations are unlawful. See, e.g., *Ryder Transportation Services*, 341 NLRB 761, 761–762 (2004), enfd. sub nom. *Ryder Truck Rental v. NLRB* 401 F.3d 815 (7th Cir. 2005) ("the Act allows employees to engage in persistent union solicitation even when it annoys

[33] Although a prediction of plant closure may be lawful, if the employer can show that it is the probable consequence of unionization for reasons beyond its control, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), there was no evidence presented, which shows that the Company's repeated comparisons to Hostess Brands and Meyers Bakeries and their shutdowns were rational predictions based on probable consequences beyond its control. These statements were, thus, unsupported predictions designed to intimidate employees.

[34] These allegations are listed under pars. 9(f), 11(f) and 39 of the complaint.

[35] These allegations are listed under pars. 7 and 39 of the complaint.

[36] These allegations are listed under pars. 9(e), 11(e) and 39 of the complaint.

[37] These allegations are listed under pars. 9(c)-(d), 11(c)-(d), 13(a) and 39 of the complaint.

[38] These allegations are listed under pars. 9(g)-(i), 11(g)-(i) and 39 of the complaint.

or disturbs the employees who are being solicited . . . . [and] an employer's invitation to employees to report instances of "harassment" by employees engaged in union activity is violative of Section 8(a)(1).").[39]

9. Disparagement of the Union[40]

The Company violated Section 8(a)(1), when it repeatedly disparaged the Union in its January 17, 2013 memorandum. (Jt. Exh. 25.) This memo repeatedly labeled the Union's alleged campaign statements as fraudulent, in tandem with advancing an unlawful plant closure threat[41] and appeal to racial prejudice.[42] See, e.g., *Sears, Roebuck & Co*., 305 NLRB 193 (1991) (disparagement of a union becomes unlawful, when accompanied by other coercive statements); *Tony Silva Painting Co.*, 322 NLRB 989, 993 fn. 5 (1996).[43]

B. The 8(a)(3) Allegations[44]

The General Counsel alleged that the Company violated Section 8(a)(3) when it: placed Loudermilk, Phillips, and Marks under investigation and issued Personnel File Documentations; issued Marks a warning; suspended Phillips; fired Contreras and refused to grant him time off; and granted a wage increase to the unit following its withdrawal of recognition.[45]

1. General legal principles

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) sets forth the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065–1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (citations omitted).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the Wright Line analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Loudermilk Investigation and Personnel File Documentation

a. Prima facie case

The General Counsel made a prima facie *Wright Line* showing concerning Loudermilk's investigation and Personnel File Documentation. Union activity was established, when Loudermilk told Capetillo, who was antiunion, that she supported the Union, and opined that it should not be blamed for the Hostess closure. (Jt. Exh. 31.) Knowledge was adduced, when Loudermilk prepared a written statement for the Company about this exchange. Union animus was demonstrated by the multitude of violations present herein.

b. Affirmative defense

The Company failed to show that it would have taken these actions, absent Loudermilk's union activity. First, the decision to expend resources interviewing her, investigating uncontested conduct for a full 2 months, and preparing a lengthy memo and analysis is highly suspect, given that she only asked someone about his vote. (Jt. Exh. 28.) The decision to respond so dramatically to such a minor and lawful interaction reeks of invidious intent. Moreover, given that there is no evidence that the Company limited other workplace comments beyond pro-union banter, or investigated Capetillo for his comparable activity, its actions were discriminatory. Finally, the multitude of additional violations present herein further establish that Loudermilk's treatment was unlawful.

3. Marks Investigation, Personnel File Documentation and Suspension

a. Prima facie case

The General Counsel has made a prima facie *Wright Line*

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[39] See also *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988) ("if anyone was harassed by the Union . . . contact management and they would take care of it"); *W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980).

[40] These allegations are listed under pars. 8(b) and 39 of the complaint.

[41] The memo stated that, "the union appears to have plans to take our employees out on strike here in Hope, same as they recently did at Hostess, where over 18,000 jobs were lost and 33 bakeries and retail outlets were closed." (Jt. Exh. 25.) The Company failed to produce any evidence showing that the Union actually had concrete strike plans, or that its closure prediction was a probable consequence of the strike for reasons beyond its control. Such commentary was, therefore, unlawful. See *Federated Logistics & Operations.*, supra, 340 NLRB at 256.

[42] The memo attributed this racist statement to the Union: "[the Union said that the Company is] "gonna fire Hispanics (Latino employees) if they change their names." (Jt. Exh. 25). Given that the Company failed to show that the Union actually made this divisive statement, its usage of racial baiting to further its election interests was unlawful. See *Holiday Inn of Chicago South*, 209 NLRB 11 (1974) (election appeal to racial prejudice is unlawful).

[43] The repeated nature of the instant disparagement also, arguably, violated the Act. See *Regency House of Wallingford*, *Inc.*, 356 NLRB 563 (2011) (repeated denigration implies that unionization is futile).

[44] These allegations are listed under pars. 15, 16, 18, 19, 20, 21, 22, 36 and 40 of the complaint.

[45] Given that that the increase independently violated Section 8(a)(5), it is unnecessary to pass on whether it also violated Section 8(a)(3) because the ultimate remedy would be unaltered. *Bryant & Stratton Business Institute,* 321 NLRB 1007 fn. 4 (1996).

showing concerning Marks' investigation, Personnel File Documentation and suspension. Calderon testified that she had significant union activity, which included meeting with union representatives in the break area, attending union meetings and handling grievances. The Company knew about these activities, on the basis of her grievance-handling, and Capetillo's complaints. See (Jt. Exh. 28). As noted, animus was demonstrated by the multitude of violations present herein.

b. Affirmative defense

The Company failed to show that it would have taken these actions, absent Marks' union activity. First, regarding the investigation and documentation, it is implausible that the Company would have conducted a multiple-month investigation and drafted a lengthy memo regarding such a minor verbal exchange, absent an antiunion motive. Moreover, if the Company investigated every minor infraction with the same fervor, it would hardly have time to fulfill its primary purpose. Second, regarding Marks' suspension, its rationale was pretextual. Simply put, it opted to suspend a long-term employee because she needed to use the bathroom and returned in five minutes, when it is undisputed that: she found coverage; there was no team leader or supervisor present for immediate short-term relief; and production was unaffected. The Company failed to show that others were disciplined for similar conduct and only provided documentation that others were disciplined less severely for more egregious abandonments. I credited the testimony, as noted, that others routinely left the line for short restroom breaks, without issue and with supervisory knowledge.

4. Phillips investigation, personnel file documentation and written warning

a. Prima facie case

The General Counsel has made a prima facie *Wright Line* showing concerning Phillips' investigation, Personnel File Documentation and written warning. Union activity was adduced, when she urged Capetillo to support the Union and offered him a prounion article. (Jt. Exh. 31). Knowledge was derived by the Company's investigation of this issue. As noted, animus was demonstrated by the multitude of violations present herein.

b. Affirmative defense

The Company failed to show that it would have taken these actions, absent Phillips' union activity. Its decision to investigate her, reflect upon her case for multiple months, prepare a lengthy memo analyzing her actions, and then issue a warning stating that termination was strongly considered, to someone who solely handed a coworker an article, renders its actions highly suspect. It provided no evidence that: she was a recidivist rule violator that jeopardized food safety; handled similar cases comparably; or production was harmed. Additionally, the extensive additional violations present herein irreparably undercut any assertion that its actions were non-discriminatory.

5. Contreras failure to grant leave and discharge

Contreras' firing and leave refusal were lawful. Although the General Counsel established a prima facie case, the Company adduced that it would have undertaken such actions, absent his union activity.

a. Prima facie case

The General Counsel made a prima facie *Wright Line* showing. Contreras engaged in union activity, when he joined the Union and rejected White's invitation to sign an antiunion petition. Knowledge and animus were established by White's antiunion comments.

b. Affirmative defense

The Company demonstrated that it would have denied his leave request and fired him, absent his union activity. Simply put, he had a horrendous attendance record and the Company reached the point, where it rationally determined that it would no longer grant him leave or retain his services. His "no-call, no-show" connected to his arrest was the final straw in this process. The Company's actions were consistent with its workplace rules and repeated terminations of other employees, with severe attendance issues, and, thus, were lawful.

C. The 8(a)(5) Allegations

1. Prewithdrawal of recognition unilateral changes

a. Surveillance cameras[46]

The Company's installation of surveillance cameras in the break room violated Section 8(a)(5). The installation of such cameras is a mandatory subject of bargaining, which requires pre-implementation notice and bargaining. See, e.g., *Anheuser-Busch*, 342 NLRB 560 (2004), petition for review denied in relevant part sub nom. *Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005); *Colgate-Palmolive Co.,* 323 NLRB 515 (1997); *Nortech*, 336 NLRB 554, 568 (2001). It is undisputed that the Company took unilateral action, without notice or bargaining. The existence of analogous cameras in production areas, where there was limited union activity, was not a clear and unmistakable waiver of the Union's right to bargain over the installation of such cameras in the break area, where there was repetitive union activity. The CBA also failed to contain a clear and unmistakable waiver of the Union's right to bargain over this topic. These actions, therefore, violated Section 8(a)(5).

b. Union access[47]

The Company violated Section 8(a)(5), when Ledbetter repeatedly altered the Union's access rights. These changes, which greatly deviated from the Company's past access practices, included, inter alia: requiring the Union to divulge its reasons for visiting the plant; mandating it to identify the employees that it sought to meet with; banning all visits not involving grievances; prohibiting solicitation and election discussions; capping the duration and frequency of visits; prohibiting meetings in the large break area and then relegating the Union to a cubicle; threatening to respond to violations with expulsion, arrest and total exclusion; prohibiting all access between

[46] These allegations are listed under pars. 24, 37, and 41 of the complaint.

[47] These allegations are listed under pars. 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, and 41 of the complaint.

March and November 2012, and at other times thereafter; and removing the window between the small and large break rooms that the Union used to communicate with unit employees. It is undisputed that these changes were imposed, without notice or bargaining.[48]

A contractual union access provision is a term and condition of employment that survives the agreement's expiration. Moreover, changes to contractual access provisions or past access practices are mandatory subject of bargaining, which require notice and bargaining before enacting such changes. *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009); *T.L.C. St. Petersburg,* 307 NLRB 605, 610 (1992); *Ernst Home Centers*, 308 NLRB 848–49 (1992), affd. 985 F.2D 579 (11th Cir. 1993).

The Company's voluminous unilateral changes to the Union's access rights violated Section 8(a)(5). See, e.g., *BASF Wyandotte Corp.*, 274 NLRB 978 (1985) , enfd. 798 F.2d 849 (5th Cir. 1986)(unilateral changes to union office space was unlawful); *Turtle bay Resorts,* supra, 308 NLRB 848–849 (unilaterally changes to past access practice); *Frontier Hotel & Casino.,* 323 NLRB 815, 818 (1997); *Oaktree Capital Management*, 355 NLRB 1272 (2010).

2. Withdrawal of recognition[49]

On July 3, 2013, the Company unlawfully withdrew recognition from the Union, as the unit's exclusive collective bargaining representative. As a threshold matter, an employer cannot lawfully withdraw recognition from a union where it has committed unfair labor practices that directly relate to the employee decertification effort, such as actively soliciting, promoting or assisting the effort. See *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 837 F.2d 1088 (5th Cir. 1988), rehearing denied 840 F.2d 15 (5th Cir. 1988). In circumstances where the employer engages in this type of misconduct, the Board "presumes that the employer's unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continuing presumption of majority support." Id. In *Ardsley Bus Corp.*, 357 NLRB 1009 (2011), the Board further explained that:

> Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to have majority support among the employees it represents. An employer may withdraw recognition from the union only if the union has actually lost majority support. . . . An employer may not, however, lawfully withdraw recognition from a union where it has committed unfair labor practices that have a tendency to cause the loss of union support. . . . Where the unfair labor practices do not involve a general refusal to recognize and bargain with the union, there must be a causal relationship between the unfair labor practices and the loss of support in order for the withdrawal of recognition to be unlawful. . . . To determine whether there is a causal connection between an employer's unfair labor practices and employees' disaffection, the Board considers the following factors:
>
> (1)The length of time between the unfair labor practices and the withdrawal of recognition;
>
> (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
>
> (3) any possible tendency to cause employee disaffection from the union; and
>
> (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

357 NLRB 1009, 1012.

In the instant case, the Company's extensive and repeated violations caused the widespread employee disaffection, which prompted the third decertification petition. These violations were close in time to this petition, and were so voluminous and egregious that they naturally spawned significant disaffection from a Union that had been rendered powerless by a recalcitrant employer. As noted, the Company repeatedly and unlawfully threatened and disciplined union adherents, threatened that ongoing union support would cause a plant closure, continuously labeled ongoing union support as futile and useless, and deeply undermined the Union by making several unilateral changes, which included eviscerating its ability meet with unit employees at the plant. Such actions naturally spawned the third petition, and left an indelible message that continued unionization was tantamount to job loss and a pointless exercise. See *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001).

3. Postwithdrawal of recognition unilateral changes[50]

Given that the Company unlawfully withdrew recognition from the Union, its subsequent unilateral changes regarding wages and Union access were unlawful. See, e.g., *Northwest Graphics, Inc*., 342 NRLB 1288, 1288 (2004) (unilateral wage increases); *Turtle Bay Resorts*, supra, 353 NLRB at 1275 (union access).

The Company's refusal to deduct and remit dues to the Union since July 2013, however, was lawful. Although the Board previously held that dues-checkoff provisions survive contract expiration and that postexpiration cessation was unlawful (see *Alamo Rent-A-Car*, 359 NLRB 1373, 1376 (2013); *WKYC-TV, Inc.*, 359 NLRB 286, 293 (2012)), such precedent was recently set aside by the United States Supreme Court. See *NLRB v. Noel Canning*, No. 12–1281, ___ S.Ct. ___ (June 26, 2014) (setting aside Board precedent from January 4, 2012 through August 4, 2013, because the Board lacked a quorum during this period, as a consequence of the invalid appointments of three of its five members). I find, as a result, that the Board's pre-*Noel Canning* precedent is controlling herein, which provides that employers do not violate Section 8(a)(5) by unilaterally ceasing dues checkoff following the expiration of their collective-bargaining agreements. See, e.g., *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (subsequent history omitted). Thus, given that the parties' CBA expired on February 8, 2012, the Company's July 2013 cessation of dues deductions and remissions was valid.

[48] I credited the General Counsel's witnesses, who said that these changes significantly altered prior policies.

[49] These allegations are listed under pars. 38 and 41 of the complaint.

[50] These allegations are listed under pars. 34–37 and 41 of the complaint.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular production and sanitation employees employed by the Company at its Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

4. The Company violated Section 8(a)(1) of the Act by

(a) Threatening employees with discipline, job loss and other unspecified reprisals, if they engaged in union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Creating the impression that employee union activities were under surveillance.

(d) Telling employees that it would be futile for them to retain the Union as their collective-bargaining representative.

(e) Promising employees improved wages and other unspecified benefits, in order to discourage them from retaining the Union as their collective-bargaining representative.

(f) Disparaging the Union, while appealing to racial prejudice, in order to discourage employees from retaining the Union as their collective-bargaining representative.

(g) Threatening employees that the Company would close, if they engaged in Union or other protected concerted activities.

5. The Company violated Section 8(a)(1) and (3) of the Act by

(a) Subjecting Loudermilk to a disciplinary investigation and issuing her a personnel file documentation because she engaged in union or other protected concerted activities.

(b) Subjecting Marks to a disciplinary investigation and issuing her a personnel file documentation and suspension because she engaged in union or other protected concerted activities.

(c) Subjecting Phillips to a disciplinary investigation, and issuing her a personnel file documentation and written warning because she engaged in union or other protected concerted activities.

6. The Company violated Section 8(a)(1) and (5) of the Act by

(a) Withdrawing recognition from the Union on July 3, 2013.

(b) Unilaterally installing surveillance cameras in the break area.

(c) Unilaterally changing the Union's plant access rights and procedures.

(d) Prohibiting the Union from entering the plant between March and November 2012, and, at all times, after February 2013.

(e) Unilaterally increasing employees' wages in September 2013.

7. The Company has not otherwise violated the Act.

8. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company committed certain unfair labor practices, it must cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

It shall expunge from its records any reference to these personnel actions: Loudermilk's disciplinary investigation and documentation; Marks' disciplinary investigation, documentation and suspension; and Phillips' disciplinary investigation, documentation and warning. It shall also provide them with written notice of such expunction, and inform them that its unlawful conduct will not be used against them as a basis for future discipline. It shall also make Marks whole for her suspension; her backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

It shall also recognize the Union and, upon request, meet and bargain with it regarding the unit's terms and conditions of employment. It will reinstate its access rights, and rescind any unilateral changes made to such access rights since March 8, 2012. It shall remove the surveillance cameras that were installed in the break area in January 2013 and restore the windowed walls that divided the break area. It will, if requested by the Union, rescind the unilateral wage increase that was implemented after its withdrawal of recognition.

It shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J. Picini Flooring*, 356 NLRB 11 (2010). Because the record demonstrates that it employs a significant number of unit employees, who do not speak or read English, the attached notice shall be posted in English and Spanish.

In addition to the traditional remedies for the violations found herein, Ledbetter will read the notice marked "Appendix" to unit employees at the plant, during work time, in the presence of a Board agent. His notice reading will simultaneously be translated into Spanish. A notice reading will counteract the coercive impact of the instant unfair labor practices, which were substantial, pervasive and frequently committed at analogous captive audience meetings. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004), enfd. 156 Fed.Appx. 386 (2d Cir. 2005).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[51]

ORDER

The Company, Southern Bakeries, LLC, Hope, Arkansas, its officers, agents, successors, and assigns, shall

[51] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Threatening employees with discipline, job loss and other unspecified reprisals, if they engage in Union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Creating the impression that employee union activities were under surveillance.

(d) Telling employees that it would be futile for them to retain the Union as their collective-bargaining representative.

(e) Promising employees improved wages and other unspecified benefits, in order to discourage them from retaining the Union as their collective-bargaining representative.

(f) Disparaging the Union, while appealing to racial prejudice, in order to discourage employees from retaining the Union as their collective-bargaining representative.

(g) Threatening employees that the Company would close, if they engaged in union or other protected concerted activities.

(h) Commencing disciplinary investigations against, issuing written warnings and personnel file documentations to, suspending, or otherwise discriminating against Lorraine Marks, Sandra Phillips or Vicki Loudermilk, or any other employee, for supporting Bakery, Confectionary, Tobacco, Grain Millers Union, Local 111, or any other labor organization, or for engaging in other protected concerted activities.

(i) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular production and sanitation employees employed by the Company at its Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective-bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

(j) Granting a wage increase to its unit employees, without providing the Union notice and an opportunity to bargain.

(k) Implementing new rules regarding the Union's access to unit employees at the plant since March 8, 2012, and, thereafter, barring the Union from entering the plant, without providing it notice and an opportunity to bargain.

(l) Installing surveillance cameras in the break area, without providing the Union notice and an opportunity to bargain.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[52]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the unit and, upon request, bargain with it regarding the wages, hours, and terms and conditions of employment of unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) If requested by the Union, rescind the wage increase that was implemented in September 2013, and bargain with it before implementing future wage and benefit increases for unit employees.

(c) Restore the plant access policy, which was in effect prior to March 8, 2012.[53]

(d) Remove the surveillance cameras that were installed in the break area, and bargain with the Union before installing such cameras in the break area in the future.

(e) Make Marks whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplinary investigations, written warning, Personnel File Documentations and suspension concerning Marks, Phillips and Loudermilk, and within 3 days thereafter notify them, in writing, that this has been done and that such discipline will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(h) Within 14 days after service by the Region, physically post at its Hope, Arkansas facility, and electronically send and post via email, intranet, internet, or other electronic means to its unit employees who were employed at its Hope, Arkansas facility at any time since March 8, 2012, copies of the attached Notice marked "Appendix" in English and Spanish.[54] Copies of the Notice, on forms provided by the Regional Director for Region 15, after being signed by the Company's authorized representative, shall be physically posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by it at the facility at any time since March 8, 2012.

(i) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be

[52] A broad cease and desist order is appropriate herein. See, e.g., *Regency Grande Nursing & Rehabilitation Center*, 354 NLRN 530, 531 fn. 10 (2009), affd. 355 NLRB 587 (2010), enfd. 441 FedAppx. 948 (3d Cir. 2011).

[53] This includes restoring the windowed wall, which divided the break area.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

read to its employees by Ledbetter in the presence of a Board agent; such notice reading will be simultaneously translated into Spanish by an interpreter.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed, insofar as it alleges violations of the Act not specifically found.

Dated Washington, D.C. July 17, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten discipline, job loss or other unspecified reprisals, because you support the Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111 (the Union) or any other union.

WE WILL NOT interrogate you about your Union or other protected concerted activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT tell you that it would be futile or useless for you to retain the Union as your collective-bargaining representative.

WE WILL NOT promise you better wages and benefits, in order to discourage you from retaining the Union as your collective-bargaining representative.

WE WILL NOT disparage the Union, while appealing to racial prejudice, in order to discourage you from retaining the Union as your collective-bargaining representative.

WE WILL NOT threaten that we will close the plant, if you engage in union or other protected concerted activities.

WE WILL NOT investigate you, issue written warnings and personnel file documentations, suspend you, or otherwise discriminate against because you support the Union or any other labor organization, or for engaging in other protected concerted activities.

WE WILL NOT withdraw recognition from the Union or refuse to bargain with it as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular production and sanitation employees employed at our Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective-bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT make changes to your wages, hours, and other terms and conditions of employment, without first notifying the Union and offering it an opportunity to bargain regarding these proposed changes.

WE WILL NOT limit the Union's ability to enter the plant and break area, without first notifying the Union and offering it an opportunity to bargain regarding the proposed changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, upon request, cancel and rescind all terms and conditions of employment that we unlawfully implemented since March 8, 2012, which included our installation of surveillance cameras in the break area, changes in the Union's plant access rights and wage increase, but we are not required to cancel any unilateral changes that benefited you, such as the wage increase that we implemented in September 2013.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful investigations, personnel file documentations, written warnings and suspensions involving Lorraine Marks, Sandra Phillips and Vicki Loudermilk.

WE WILL make Marks whole for any loss of earnings and other benefits resulting from her suspension.

WE WILL, within 3 days thereafter, notify Marks, Phillips and Loudermilk in writing that the above-described actions have been taken and that the investigations, personnel file documentations, written warning and suspension will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers in English by Executive Vice President Rickey Ledbetter, and simultaneously translated into Spanish, in the presence of an agent of the National Labor Relations Board.

SOUTHERN BAKERIES, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15–CA–101311 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.